86-394

No. 86-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CITIZENS FOR DECENCY THROUGH LAW, INC.,
Petitioner,

v.

OAK INDUSTRIES, INC.,
AND OAK MEDIA DEVELOPMENT CORPORATION,
Respondents.

On Writ of Certiorari To The United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Bruce A. Taylor
210 Continental Plaza
11000 N. Scottsdale Road
Scottsdale, Arizona 85254
(602) 483-8787
Counsel of Record for Petitioner.

QUESTIONS PRESENTED

I

Whether The Nov. 15, 1984 U.S. District Court Order Entered In A Federal Diversity Of Citizenship Action, Denying Petitioner CDL's */ Motion For Leave To File A Third Counterclaim Which Contained A Request For Two Forms Of Relief: (A) A Prayer For Declaratory Judgment Relief That Respondents "Oak" */ Were Engaged In An Unfair Trade Practice Under California Law; To Wit, Exhibiting Hard-Core Pornographic Motion Picture Films On Their "On-TV Adults Only" Program Service; And (B) A Request For Injunctive Relief Against Oak's Unfair Trade Practice Of Continuously Exhibiting Such Hard-Core Pornographic Motion Picture Films, Is An Appealable

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*/ Petitioner Citizen For Decency Through Law, Inc., is hereinafter designated "CDL". Respondents Oak Industries, Inc., and Oak Media Development Corporation are hereinafter referred to collectively as "Oak".

Interlocutory Order Under In-A-Floor Safe Co. v. Die Bolt Safe and Lock Co., 91 F.2d 341 (CA 9, 1937)?

II

Whether The U.S. District Court Order Denying CDL's Motion, Pursuant To F.R.C.P. Rules 13(a), 13(e) and 13(f), For Leave To File The Proposed Counterclaim, On The Grounds Of "Oversight, Inadvertance, Or Excusable Neglect" And That "Justice Requires" The Same, Was An Abuse Of Discretion Where, At The Time Of Such Denial: (1) No Discovery Had Taken Place, And It Had Been Agreed That The Matter Of Depositions And Status Conferences Would Be Held In Abeyance To Await The Outcome Of CDL's Effort To Plead A Valid Counterclaim to Oak's Libel And Slander Complaint; And (2) Counterclaimant CDL Had Expended A Substantial Amount Of Time And Sums Of Money In Preparing The Autoptical Evidentiary Exhibits 3A Through 3F, 5A Through 5E, And

6A Through 6D, Which Were Pleaded By Incorporation In The Counterclaim And Which, While Necessary For Use In The Discovery Process In Its Defense To Oak's Libel And Slander Complaint, Were Essential To A Precise Articulation Of The Counterclaim; And (3) Oak Was Not Unfairly Prejudiced In Getting Its Case Tried?

III

Whether Oak's Sale Of It's "ON-TV Adults Only" Program Service To Select-TV Of California During The Pendency Of This Appeal Renders This Appeal Moot, Where The Continuing Weekly Surveillances Of Such Television Broadcasts By A Subscriber During The Period 1981 To Present Show That, As A Result Of Such Sale: (1) Select TV Of California Is Now Engaged In The Same Unfair Trade Practice, And Is Now Exhibiting The Same Hard-Core Pornographic Motion Picture Films Which Were Televised On Oak's "ON-TV Adults Only" Program Service During

The Period From 1981 To The Date Of Such Sale ; And (2) The Original Subscriber To Oak's "ON-TV Adults Only" Program Service In 1981 Continues To Receive The Same Hard-Core Pornographic Motion Picture Transcriptions On His Television Screen, Pursuant To His Original Subscription Contract With Oak's "ON-TV Adults Only" Program Service And Without Any Contract Modification Or Assignment Of Rights, Except That Such Subscriber Is Now Billed For That Service By Select TV Of California Rather Than ON-TV?

IV

Whether The Order Of The Court Of Appeals Dismissing CDL's Appeal As Moot, By Reason Of A Sale Of The Program Service From Oak To Select TV Of California During The Pendency Of The Appeal, Was An Unconstitutional Infringement Of CDL's Due Process Right Of Access To The Courts, And The Appellate Process?

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On Writ of Certiorari To The United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Citizens for Decency Through Law, Inc., respectfully prays that a Writ of Certiorari be issued to review the order of the United States Court of Appeals for the Ninth Circuit, entered on

April 15, 1986, which dismissed the appeal in Citizens for Decency Through Law, Inc. v. Oak Industries, Inc. and Oak Media Development Corporation, No. 84-6541 as moot. A Petition for Rehearing was denied on June 10, 1986.

OPINIONS BELOW

The Order of U.S. District Judge Gordon Thompson Jr. entered on November 15, 1984, denying CDL's Motion for Leave to File a Third Counterclaim, is reprinted in Appendix "A" to this Petition.

The Orders of the U.S. Court of Appeals for the Ninth Circuit, filed on December 3, 1985 and January 30, 1986, which remanded the case to the U.S. District Court for a factual determination regarding events occurring during the pendency of the appeal, is reprinted at Appendix "B".

The Order of the U.S. District Court

Judge Gordon Thompson, Jr., entitled "Order Determining Validity of Sale and Mootness", entered on February 26, 1986, is reprinted at Appendix "C".

The Order of the Court of Appeals for the Ninth Circuit, filed on April 15, 1986, which dismissed CDL's appeal as moot, is reprinted in Appendix "D" to this Petition. The Order of the Court of Appeals for the Ninth Circuit, filed on June 10, 1986, which denied the Petition for Rehearing, is reprinted in Appendix "E" to this Petition.

JURISDICTION

A. Jurisdiction of the U.S. District Court: Jurisdiction over Oak's Complaint for Damages for Slander and Libel exists by reason of diversity of citizenship, 28 U.S.C. Section 1332. Similarly, jurisdiction of the Counterclaim based on an "unfair trade practice" under California law also exists by reason of diversity of

citizenship.

B. Jurisdiction of the Court of Appeals: United States District Court Judge Gordon Thompson, Jr.'s order is an appealable interlocutory order, inasmuch as the Counterclaim seeks injunctive relief under California Business and Professions Code Sections 17203, 17204, 17205 and 17535, and in the Ninth Circuit an Order Denying Leave to File a Counterclaim Seeking Injunctive Relief is an interlocutory order tantamount to the denial of an injunction and is appealable. In-A-Floor Safe Co. v. Die Bolt Safe and Lock Co., 91 F.2d 341 at 342 (CA 9, 1973); See, also, Spangler et al. v. U.S., 415 F.2d 1242 at 1246 (CA 9, 1967): Cyc. Fed. Proc. (3rd Ed.), Vol. 6, at section 16.47 on pages 68-69.

C. This Court's jurisdiction is invoked under 28 U.S.C. section 1254(1), and Rules 17.1(a) and 17.1(c) of the

U.S. Supreme Court.

STATE STATUTE INVOLVED

The text of California Business and Professions Code Sections 17200, 17202, 17203, 17204, 17205, 17500 and 17535 authorizing "any person acting for the interests of itself, its members or the general public" to bring a civil action for a declaratory judgment and injunctions against persons engaged in "unlawful business practices" and "false and misleading advertising" is set forth at Appendix "F" to this Petition.

STATEMENT OF THE CASE

On this appeal, CDL contends: (1) that Exhibit 3A through 3F, 5A through 5E and 6A through 6D, being time and motion studies of 13 motion picture films which were exhibited by Oak Industries, Inc. and Oak Media Development Corporation

(hereinafter "OAK") on its ONTV programming, and which were pleaded by incorporation in the Counterclaim, demonstrate that such films are obscene per se (as a matter of law) and contraband under federal law, and are hard-core pornography under California law; (2) that Counterclaimant CDL is entitled to a declaratory judgment to that effect pursuant to California Code of Civil Procedure Section 1060, and an injunction against their further exhibition, pursuant to California Business and Professions Code Section 17200 et seq. as construed by the appellate courts in the State of California in People v. E.W.A.P., Inc., 106 Cal.App.3d 315 (May 29, 1980); (3) that the U.S. District Court for the Southern District of California had subject matter jurisdiction over the California causes of action for an injunction and declaratory judgment relief pursuant to its diversity jurisdiction under 28 U.S.C. Section 1332; (4) that

said causes of action stated a compulsory counterclaim under F.R.C.P. Section 13(a) which satisfied the four-fold test set forth in Magna Pictures Corporation et al. v. Paramount Pictures Corporation, 265 F.2d 144, 152 (U.S.D.C. C.D. California 1967); (5) that the Court's refusal to grant CDL's motion for leave to file a third counterclaim and assume jurisdiction of such State of California causes of action constitutes an abuse of discretion and error as a matter of law, where the trial record establishes that: (i) the status conferences and depositions had been held in abeyance by the parties with the trial court's concurrence to await CDL's attempt to plead a valid counterclaim; (ii) the parties had stipulated that the exhibits to the second counterclaim (Declaratory Judgment) might be withdrawn for use in the preparation of its proposed pleadings and papers in support of its motion for

leave to file a third counterclaim; (iii) the third counterclaim, while predicated upon California Business and Professions Code Sections 17200 et seq., sought both a declaratory judgment and injunction, and can be justified as an amendment to the second counterclaim which sought declaratory judgment relief upon a different theory; and (iv) Oak cannot show it has been unfairly prejudiced by the delay so as to justify a denial of the motion; and (6) that the sale of the "ONTV Adults Only" program service from Oak to SelecTV of California during the pendency of the appeal did not "moot" the appeal, and the Court of Appeals' dismissal on those grounds is an unconstitutional infringement of CDL's due process right of access to the Courts and the appellate process.

STATEMENT OF FACTS

1. On May 31, 1983, Oak filed its "Complaint for Damages for Slander and Libel" in the United States District Court for the Southern District of California, in which it alleged at pages 3, line 20 et seq. that the Defendant Bruce A. Taylor made the following defamatory statements:

a. Oak's ONTV service has been showing fairly hard-core pornography films and the production of such films is inextricably linked with organized crime; and

b. The simple fact that Oak is offering hard-core pornographic films indicates that there's some kind of arrangement between Oak and the porno industry and the people in it.

2. On July 18, 1983, Defendants Bruce A. Taylor and CDL answered the complaint and filed a "Counterclaim for

Damages for Slander and Libel".

3. On August 10, 1983, Oak filed a motion to dismiss the first counterclaim (Libel and Slander), and on October 13, 1983 an order was entered dismissing the first counterclaim without leave to amend.

4. On December 21, 1983, a status conference was held at which CDL's counsel informed the Court that CDL would move for leave to file an amended counterclaim. It was agreed at that time that the matter of depositions and further status conferences would be held in abeyance until after the Court had taken appropriate action in response to the newly filed motion.

5. On February 6, 1984, the Court orally granted the Defendant CDL leave to file a second counterclaim (Declaratory Relief) under F.R.C.P. Section 13(f).

6. On June 15, 1984, Oak filed a motion to dismiss the amended second counterclaim, which was heard on July 24,

1984. On that date, the Court entered an order granting Oak's motion to dismiss and instructed Oak's attorney to prepare a formal order.

7. On August 9, 1984, Oak's attorney Robert G. Russell, Jr. transmitted a letter to the Court with two proposed forms of order: one dismissing the amended second counterclaim "with prejudice", and the other omitting the "with prejudice" language.

8. On or about September 26, 1984, the parties lodged a stipulation with the Court in which the parties stipulated as follows:

> "The Undersigned Parties Hereby Stipulate:
>
> 1. To an order authorizing Defendant's Proposed Exhibits 1-6 (originals only) which were lodged by defendant CITIZENS FOR DECENCY THROUGH LAW, INC. ("CDL") with the Clerk of the Court on July 23, 1984 in Opposition to Plaintiff's Motion to Dismiss Counterclaim, to be returned so that said exhibits may be used by Defendant CITIZENS FOR DECENCY THROUGH LAW, INC. ("CDL") in the preparation of its proposed

pleadings and papers in support of CDL's Motion for Leave to File a Third Counterclaim."

9. On September 26, 1984, the Court signed an order approving the stipulation. On September 26, 1984, the Court also signed that form of Oak Attorney Robert G. Russell, Jr.'s two alternative proposed orders, which omitted the "with prejudice" language, dismissing the amended second counterclaim for failure to allege a justiciable case or controversy.

10. On October 5, 1984, CDL filed notices of motion pursuant to F.R.C.P. Rules 13(a), (e), and (f), a motion for leave to file a third counterclaim on the grounds that the same had been omitted through "oversight, inadvertence and excusable neglect" and that "justice requires" the same, a motion to add a party defendant, and a memorandum of points and authorities. CDL also filed a declaration explaining the "oversight, inadvertence,

and excusable neglect" and other meritorious reasons for granting the motion, and lodged with the court a copy of its proposed counterclaim entitled "Third Counterclaim of Defendant Citizens for Decency Through Law, Inc. for Relief Pursuant to California Business and Professions Code Section 17200 et seq. and California Code of Civil Procedure Section 1060 (Declaratory Judgment Statute)", which prayed for injunctive relief. At page 3, lines 20 et seq. of the Third Counterclaim, federal jurisdiction was alleged to exist under 28 U.S.C. Section 1332 (diversity of citizenship jurisdiction); the Federal Declaratory Judgment Statute, 28 U.S.C. Section 2201 et seq. and Rule 57; 28 U.S.C. Section 1331 (federal question); 18 U.S.C. Section 1951, 1952, 1961 et seq.; and pursuant to its diversity jurisdiction over the California Business and Professions Code and California Declaratory Judgment Relief claims.

11. On November 5, 1984, the Court heard oral argument, and on November 15, 1984 entered its order denying the motion, citing Ralston-Purina Co. v. Berke, 541 F.2d 1363, 1367 (9th Cir. 1976).

12. On December 10, 1984, CDL's attorney of record transmitted a letter to Oak Attorney Robert G. Russell, Jr. requesting advise as to how the scheduling of depositions, which had been held in abeyance pending the outcome of the defendant CDL's efforts to state a counter-claim, could be expedited.

13. On December 13, 1984, CDL filed a notice of appeal in the U.S. District Court for the Southern District of California.

14. Oral argument on CDL's interlocutory appeal was set for December 3, 1985. Prior thereto and on or about November 22, 1985, Oak served and filed a document entitled "Declaration of S. James

Miller Regarding Mootness of Relief Sought" with the Court of Appeals, a copy of which appears at Appendix "G" to this Petition. In response, CDL served and filed a document on December 3, 1985 entitled "Declaration of James J. Clancy in Opposition to Declaration of S. James Miller and Claim Regarding Mootness of Relief Sought", a copy of which (less enclosures) appears at Appendix "H" to this Petition. At oral argument on December 3, 1985, the Court of Appeals entered an order remanding the case to the District Court "for 56 days to resolve the factual dispute and to rule on whether this issue appealed to us is moot". See copy of order at Appendix "B" to this Petition.

On or about January 15, 1986, Oak served and filed a document in the District Court entitled "Declaration of S. James Miller", a copy of which appears at Appendix "I" to this Petition; and on or

about January 27, 1986, CDL served and filed a pleading entitled "Memorandum of Points and Authorities in Opposition to Plaintiffs' Claim of Mootness", a copy of which appears at Appendix "J" to this Petition. Following argument on December 5, 1985, and February 3, 1986, the U.S. District Court entered its "Order Determining Validity of Sale and Mootness", a copy of which appears at Appendix "C" to this Petition.

On April 15, 1986, the Court of Appeals entered its order dismissing the appeal as moot, and on June 10, 1986, entered its order denying CDL's petition for rehearing. A copy of the Petition for Rehearing appears at Appendix "K" to this Petition.

As an offer of proof on CDL's claim of an unconstitutional infringement of its right of access to the courts, Petitioner has attached as Appendix "P" to this Petition, the response of the

Federal Communications Commission to James J. Clancy, Petitioner's Counsel of Record in the trial court below, dated May 27, 1986. In that communication, the F.C.C. reaffirms its refusal to address an administrative claim against Oak for the identical tortious conduct alleged in the counterclaim herein, as follows:

> "In any event, and despite the procedural infirmity of your pleading, analysis of the merits of your claims reveals that you have neither shown a material error or omission in the original decision nor raised additional facts not previously considered in our prior decision that would cause us to depart from our earlier conclusions. See Section 1.106 of the Commission's Rules. As stated previously in our January 30, 1985 decision, the Commission will not become the national arbiter of program tastes or the national censor of programs contrary to Section 326 of the Communications Act of 1934, as amended. In that regard, and notwithstanding your appeal to the Court of Appeals to reverse the lower court's rejection of your attempt to have such programming declared obscene or indecent under standards enunciated by the Supreme Court, there is simply no basis for further Commission action at this time.
> Accordingly, to the estent that your letter represents a petition for

> reconsideration of the January 30, 1985 grant of the KBSC(TV) license renewal application, it is dismissed." (our emphasis).

SUMMARY OF ARGUMENT

The interlocutory appeal is proper under In-A-Floor Safe Co. v. Die-Bolt Safe and Lock Co., 91 F.2d 341 at 342 (CA 9, 1937) which is controlling. An order denying a motion for leave to file either a permissive or a compulsory counterclaim, which seeks injunctive relief, is an appealable interlocutory order under 28 U.S.C. Section 1292(a)(1).

The parties and the court had agreed that both the pre-trial status conference and discovery process should be suspended to await the court's rulings on CDL's attempt to state a viable counterclaim. The plaintiffs were not unfairly prejudiced in getting their case tried. Because CDL's counterclaim is "compulsory", it should have been allowed.

CDL's counterclaim alleges standing under California law: ie., a valid statutory cause of action in CDL for both injunctive and declaratory relief against Oak, pursuant to California Business and Professions Code Sections 17204 and 17535 and a state public policy to stop "unlawful business practices". Under People v. E.W.A.P., Inc., 106 Cal.App.-3d 315, the commercial exhibition of obscene films by Oak is an "unlawful business practice".

In a diversity case under Erie Railroad v. Tompkins, the district court was required to apply state public policy, the decisions of the intermediate appellate courts, and entertain jurisdiction of the counterclaim.

Under Zeitlin v. Arnebergh and Landau v. Fording, CDL also had "standing" for a declaratory judgment against Oak under both its second and third counterclaim.

CDL's counterclaim was compulsory in that: (1) the "obscenity issue" of specific films was both a defense to the lawsuit, and

the primary issue in the "unfair trade practi counterclaim; and CDL's cause of action, (2) had matured; (3) did not require the presence of additional defendants; and (4) was not the subject of another pending action. Failure to allow the same violates the Erie Doctrine and constitutes abuse of discretion as a matter of law.

Nor can it now be argued that CDL's counterclaim will complicate the litigation, where Oak has dismissed the underlying law-suit with prejudice. When made, that argument was specious.

Under the trial facts, the "justice requires" proviso of F.R.C.P. 15(a) and 13(f) required that the counterclaim be allowed. Further, the appeal is not moot. The assignees are engaged in the same "trading in obscenity".

REASONS FOR GRANTING THE WRIT

I

IN THE NINTH CIRCUIT, AN ORDER DENYING A MOTION FOR LEAVE TO FILE EITHER A PERMISSIVE OR A COMPULSORY COUNTERCLAIM, WHICH SEEKS INJUNCTIVE RELIEF, IS AN APPEALABLE ORDER UNDER 28 U.S.C. §1292(a)(1).

The Ninth Circuit Court of Appeals held in In-A-Floor Safe Co. v. Die-Bolt Safe and Lock Co., 91 F.2d 341 at 342 (CA 9th, 1937):

> "An order denying leave to file a counterclaim praying an injunction is an interlocutory order tantamount to one refusing an injunction, so is appealable under section 129 of the Judicial Code (28 U.S.C.A. section 227). General Electric Co. v. Marvel Rare Metals Co., 287 U.S. 430, 433, 53 S.Ct. 202, 77 L.Ed. 408." [1]

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[1] See Spangler et al. v. U.S., 415 F.2d 1242 at 1246 (CA 9, 1969) where the Court noted at page 1246:

> "Under Section 129 of the Judicial Code (old 28 U.S.C. section 227), the substantial equivalent of present section 1292(a)(1) of Title 28 U.S.C., an order denying leave to file a counterclaim praying for

Compare National Machinery Co. v. Waterbury Farrell Foundry and Machine Co., et al., 290 F.2d 527 (CA 2, 1961) which, in holding that a district court's denial of leave to assert a permissive counterclaim which sought injunctive relief is not appealable under 28 U.S.C. section 1292(a)(1), noted at page 528:

> "There is support in the Seventh and Ninth Circuits for this position. Switzer Bros. v. Locklin, 7 Cir. 1953, 207 F.2d 483, certiorari denied 1954, 347 U.S. 912, 74 S.Ct. 477, 98 L.Ed. 1069; In-A-Floor Safe Co. v. Die-Bolt Safe and Lock Co., 9th Cir. 1937, 91 F.2d 341; Hancock Oil Co. v. Universal Oil Products Co., 9th Cir. 1940, 115 F.2d 45."

However, the Second Circuit National Machinery Company case is not apposite, and can be distinguished from In-A-Floor Safe Co. v. Die-Bolt Safe and

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an injunction was an appealable interlocutory order. In-A-Floor Safe Co. v. Die-Bolt Safe and Lock Co. (9 Cir. 1937), 91 F.2d 341. . . ."

Lock Co., supra, as applied to the trial facts herein. In National Machinery Company, supra, the Second Circuit noted at page 528:

> "The defendants' motion was made more than two years after the answer was filed. It was denied by the district judge who said 'The tardy injection of these new issues by the defendant will set off a new string of discovery and disclosure which will undoubtedly delay this case many more months; the plaintiff will be unfairly prejudiced in getting its case tried.'"

The record herein demonstrates that Plaintiffs were not unfairly prejudicial in getting its case tried, the discovery process has not been interfered with, nor have any new issues been injected. On the contrary, both parties agreed that the pre-trial status conferences and discovery process should be suspended to await the trial court's decision as to whether the defendant CDL could state a viable counterclaim which

should be tried in conjunction with Oak's lawsuit. On two occasions the trial court below concurred in the agreements which were reached by the parties. See Statement of Facts at paragraph 4 on page 10 and paragraph 9 on page 12.

CDL contends that National Machinery Company is further distinguishable on its facts inasmuch as that case involved a "permissive" counterclaim, whereas here CDL's counterclaim is "compulsory". In National Machinery Company, supra, the Second Circuit noted at page 528:

> "The defendant in this patent suit appeals from an order of the district court denying leave for it to amend its answer so as to assert permissive counterclaims arising out of two patents similar to those on which the plaintiff brought suit. . . By refusing to permit the defendant to assert the claims in this suit, the court did not decide or reflect upon the merits. It merely forced the defendant to institute new proceedings in the

> same or in another forum where the plaintiff could be served. Cf. Thompson v. Broadfoot, 2 Cir. 1948, 165 F.2d 744 [denial of motion for permissive intervention held non-appealable]." (our emphasis).

In contrast, here the refusal of the trial court to entertain jurisdiction of the California lawsuit which is pleaded in the Third Counterclaim will force the defendant to go to trial in the federal court on the very same issues which would be considered in a California lawsuit between the parties pursuant to California Business and Professions Code sections 17200 et seq.. A general verdict in the U.S. District Court on the California Libel and Slander Complaint will prejudice the rights of the defendant to thereafter try the underlying issue of "obscenity" in the California Courts. See Johnson v. American Airlines, Inc., 203 Cal.Rptr. 638 at pages 640-641 (Court of Appeal,

First District, Div. 3, March 27, 1984) interpreting the res judicata effect in California State courts of a prior federal court judgment on a subsequent state court action, applying the United States Supreme Court's reasoning in Kremer v. Chemical Construction Corp., 456 U.S. 461, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982). See, also Migra v. Warren City School District Board of Education, et al., ___ U.S. ___ 79 L.Ed.2d 56 at 66, 104 S.Ct. ___ (Jan. 23, 1984). Under the "primary right" principle of California law, a cause of action authorized by the California Business and Professions Code section 17200 et seq. and involving the obscenity of motion picture films which were presented as issues in the libel and slander lawsuit would have to be tried with the libel and slander lawsuit. In upholding the dismissal of the Motion,

the Second Circuit in National Machinery Company specifically excluded from its holding those situations which involve results similar to the result which is inherent in the refusal to entertain a compulsory counterclaim, at page 528:

> "We hold, however, that a district court's denial of leave to assert a permissive counterclaim is not appealable under 28 U.S.C. section 1292(a)(1) although the counterclaim seeks injunctive relief. In relegating the defendant to a separate suit the court is not denying an injunction because the claim has no merit because the court has no jurisdiction to grant the relief (compare General Electric Co. v. Marvel Rare Metals Co., 1937, 287 U.S. 430, 58 S.Ct. 202, 77 L.Ed.408), or even because the court feels that injunctive relief is not warranted at some particular point in the proceedings (compare Telechron, Inc. v. Parissi, 2 Cir. 1952, 187 F.2d 757; United States v. New York, N.H. & H.R.R. Co., 2 Cir. 1959, 1960, 276 F.2d 525, 545-546, 553-556). The district court's order in this case turned on the wisdom of consolidating certain claims for trial in the federal courts. It did not hinge on the desirability of granting or on the power to direct equitable

> relief. It was, therefore, not the kind of refusal of an injunction which permits interlocutory review by the Court of Appeals under 28 U.S.C. section 1292(a)(1)."

Further, the Ninth Circuit rule in In-A-Floor Safe Co., supra, has recently been interpreted as applying whether the counterclaim is permissive or compulsory. See State of California et al. v. Kleppe, et al., 604 F.2d 1187 at fn. 4, on page 1191 (CA 9, 1979).

II

C.D.L.'S COUNTERCLAIM AGAINST OAK ALLEGES A STATUTORY CAUSE OF ACTION PURSUANT TO CALIFORNIA BUSINESS AND PROFESSIONS CODE §§ 17204 AND 17535 WHICH AUTHORIZE "ANY PERSON ACTING FOR THE INTERESTS OF ITSELF, ITS MEMBERS OR THE GENERAL PUBLIC" TO BRING AN ACTION FOR A DECLARATORY JUDGMENT AND INJUNCTIONS AGAINST "UNLAWFUL BUSINESS PRACTICES" AND "FALSE AND MISLEADING ADVERTISING". A FEDERAL COURT HAS NO DISCRETION TO REFUSE TO ENTERTAIN JURISDICTION OF SUCH A LAWSUIT WHERE IT IS PLEADED AS A COUNTERCLAIM AND THE JURISDICTIONAL FACTS FOR DIVERSITY OF CITIZENSHIP HAVE BEEN ESTABLISHED.

CDL's Counterclaim against Oak alleges a statutory cause of action pursuant to California Business and Professions Code Sections 17204 and 17535. Those sections, as interpreted by the California Courts, authorize "any person acting for the interests of itself, its members of the general public" to bring an action for a declaratory judgment and injunctions against persons engaged in "unlawful business practices" and "false and misleading advertising" including persons who are engaged in the commercial distribution of obscene materials. (See CR 42 at page 2, line 10 through page 3, line 16 and paragraphs 22 through 29 on page 15, line 16 through page 18, line 13). Copies of Business and Professions Code Sections 17200, 17201, 17202, 17203, 17204, 17205, 17206, 17207, 17208,

17500, 17534.5 and 17535 are set forth herein at Appendix F to this Brief.

In People v. E.W.A.P., Inc. 106 Cal.App.3d 315, 165 Cal.Rptr. 73 (May 29, 1980), the California Court of Appeal, Second District, Division 5, considered the application of the above described California Business and Professions Code sections to persons who were engaged in the commercial distribution of obscene films and held that, under California law, such was an 'unlawful business practice' (See CR 42 at paragraph 23 on page 15, line 21 et seq.) and that "misleading and untrue" advertising for the same was "false and misleading advertising" (See CR 42 at paragraphs 24 through 27 on page 16, lines 7 through page 17, line 21).

In People v. E.W.A.P., Inc., supra, the Court held as follows, at page 319:

"The distribution or possession for distribution of obscene matter is unlawful under Penal Code section 311.2. When such conduct is engaged in as a 'business practice' it comes within the meaning of section 17200. The complaint in this case adequately alleges such conduct as a business practice. It alleges that defendant E.W.A.P. is a corporation organized under the laws of California with a principal place of business at a designated address in Chatsworth. Certain individual defendants are alleged to be officers of the corporation. The complaint alleges that the defendants have engaged in 'commercial' distribution or possession for 'commercial' distribution of obscene matter over a period of approximately a year, and the complaint specifically describes the numerous films and magazines involved. A business practice has been adequately alleged. (See Barquis v. Merchants Collection Assn., supra, 7 Cal.3d at p. 113, 101 Cal.Rptr. 745, 496 P.2d 817; People v. McKale, supra, 25 Cal.3d at p. 632, 159 Cal.Rptr. 811, 602 P.2d 731).

The Legislature has determined that trafficking in obscene matter is prohibited. When engaged in as a business practice, it is an unlawful business practice. It is not necessary for the People additionally to allege that it is anticompetitive or harmful to the consumer of such products."

The Business and Professions cause of action which has been pleaded by CDL in its Third Counterclaim is an independent statutory cause of action created by the California Legislature to accomplish a specific public policy. Application of the Business and Professions Code statute to the specific facts which CDL has pleaded is clear. People v. E.W.A.P., Inc., 106 Cal.3d 315, 165 Cal.Rptr. 73. In a diversity case, a federal court is bound to follow the decisions of the intermediate appellate court. Six Companies of California, et al. v. Joint Highway Department No. 13 of the State of California, 311 U.S. 180, 188, 85 L.Ed.2d 114 at 117 (1940).

The question of "standing" in CDL's Third Counterclaim relates to "diversity" jurisdiction and a substantive right given to a litigant by

the California State Legislature and not with the law on "standing" expressed in Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252, 262, as referred to in Plaintiffs' Points and Authorities at CR 48 page 5, line 18, et seq.. Under Erie Railroad v. Harry J. Tompkins, 304 U.S. 64, at 78 the discretion of the trial court is proscribed and limited as follows:

> "Third. Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law."

See, also, Civil Actions Against State Government; Shepard's/McGraw-Hill, at pages 656-657:

> "Once jurisdiction is assumed, a federal court may be confronted with the doctrine of Erie R.R. v. Tompkins, 304 U.S. 64, 58 S.Ct.

817, 82 L.E. 1188 (1938). Put in its simplest terms, the Erie doctrine, as it has been developed by the courts since 1938, required federal courts to apply state substantive law in determining any issue or claim which has its source in state law. This principle applies to state law issues which arise in non-diversity cases as well as to issues in diversity cases. See Moore, section 0.305, p. 3042. Thus, speaking generally, the federal district courts apply federal law [primarily the federal rules] in determining procedural matters, but must apply state law in determining substantive issues which have their source in state law. The Erie doctrine obviously has its greatest impact on diversity cases. In the area of diversity, the Erie doctrine requires the application of state law not only on issues that are conventionally classified as substantive, but also on issues that are conventionally classified as procedural, for such issues 'substantially affect the outcome' of the litigation. It should also be noted that the rule of Erie applies with equal force to pendent state claims before the federal courts [section 14.15]. Chavez v. So. Pac. Trans. Co., 413 F.Supp. 1203 (E.D. Ca. 1976)."

The substantive law of the State of California set forth in its "primary right" doctrine of res judicata requir

that the issue of the "obscenity" of the films alleged in CDL's Third Counterclaim against Oak, pursuant to its cause of action under Business and Professions Code Section 17200 et seq., which duplicates the issue of "obscenity" of the motion picture films which will be asserted in its defense of the California libel and slander lawsuit must be asserted as a counterclaim in the libel and slander lawsuit or the federal judgment will act as a bar. See Johnson v. American Airlines, Inc., 203 Cal.Rptr. 638 at pages 640-641 (Court of Appeal, First District, Div. 3, March 27, 1984) discussed above at page 23. The trial court's refusal to apply the Erie doctrine and follow California law in this instance is error as a matter of law. See Meredith et al. v. City of Winter Haven, 320 U.S. 228 at 237, 88 L.Ed.9 at 15 (1943), where the U.S. Supreme Court stated:

> "We are pointed to no public policy or interest which would be served by withholding from petitioners the benefit of the jurisdiction which Congress has created with the purpose that it should be availed of and exercised subject only to such limitations as traditionally justify courts in declining to exercise the jurisdiction which they possess."

For the same reasons CDL also contends that the record herein clearly establishes CDL's right to a declaratory judgment pursuant to California Code of Civil Procedure Section 1060 and Business and Professions Code sections 17205 and 17534.5. See Zeitlin v. Arnebergh, 59 C.2d 901; 31 Cal.Rptr. 800 (1963).

CDL made a similar contention, based upon Zeitlin v. Arnebergh, in its Amended Second Counterclaim. In a cursory ruling from the bench, reported at page 21, line 21 to page 22, line 15 of the Reporter's Transcript for July 24, 1984 (20 lines), the trial court

entered an order dismissing the Second Counterclaim without stating "why" Zeitlin did not apply, holding simply that "there is no case or controversy as I can see it." (See Statement of Facts at paragraph 6 on page 10 supra).

In Zeitlin v. Arnebergh, a private party, Zeitlin, brought a declaratory judgment action seeking a determination that Tropic of Cancer was not obscene. His complaint alleged he wished to sell the book "Tropic of Cancer" to a prospective purchaser, Ferguson, but that he was prevented from offering the book because he feared that if he did, the City Attorney, Arnebergh, would institute criminal proceedings against him for a violation of the California obscenity statute. The trial court sustained the City Attorney's demurrer for failure to state a cause of action. Upon appeal, the California Supreme

Court noted that Plaintiff had alleged that he was deprived of his basic constitutional right to read, and, in an unanimous decision, reversed, holding that the plaintiffs had pleaded the existence of an actual controversy and that a declaratory judgment would lie to determine the nature of the subject matter, i.e., whether or not it was "hard-core pornography" "whether the declaration be favorable or adverse." See Zeitlin, supra, at page 803 where the Court noted:

> "We have stated that considerations beyond the precedent's support the adjudication of the alleged obscenity of a particular book in a declaratory relief action."

Further, Zeitlin held at page 806 that, in California the issue of whether the subject matter was "hard-core pornography" was one for the Court.

Similarly, in Landau v. Fording, 245 C.A.2d 820 Fording, the Chief of

Police at Berkeley, California, informed an exhibitor, Saul Landau, that if he showed the film "Un Chant d'Amour" at Berkeley, he would be arrested for a violation of the California obscenity statute. Thereupon, Landau instituted a civil action for declaratory judgment relief under Zeitlin v. Arnebergh. In a court trial, the film was held to be "hard-core pornography". Upon appeal to the Court of Appeal, that judgment was affirmed. A petition for a hearing by the California Supreme Court was denied on December 21, 1966. Upon a petition for writ of certiorari, the U.S. Supreme Court granted the writ and affirmed the Judgment of the Court of Appeal on the merits in Landau v. Fording, 388 U.S. 456, 18 L.Ed.2d 1317, 87 S.Ct. 2189 (1967) with Justices Black, Douglas, Stewart and Fortas voting to grant the petition and reverse.

By way of analogy, both Zeitlin v. Arnebergh and Landau v. Fording are authority for the proposition that CDL's counterclaim pleads a justiciable controversy under the California Declaratory Judgment Statute C.C.P. section 1060, on the issue of the nature and character of the films being exhibited by Oak on public television. Here CDL alleges that the films are "hard-core pornography" and unlawful, and is prevented from exercising its constitutional right to speak out on "unlawful conduct" and "organized crime" and publishing those facts to its supporters and interested members of the public because it fears that Oak will sue for libel if it does. As was held by the California Supreme Court in Zeitlin at page 804, under California law:

> "Since plaintiffs set forth facts showing the existence of an actual

> controversy and have requested that these rights be adjudged by the court in a matter in which the court is competent to grant declaratory relief, they have stated a legally sufficient complaint. Upon presentation of such complaint, plaintiff is entitled to a declaration of his rights, whether the declaration be favorable or adverse, thus in the instant case the trial court order sustaining the demurrer and its dismissal of the action cannot be upheld upon the ground that plaintiffs pursued the wrong kind of action."

If Zeitlin and Landau were correctly decided on the function of the declaratory judgment remedy in the State of California, then those cases must be authoritative on the issue as to whether CDL has also stated a C.C.P. section 1060 declaratory relief cause of action under its Third Counterclaim. It should be noted, in this regard that, in Landau v. Fording, supra, the U.S. Supreme Court granted its writ of certiorari to the California Court of Appeal and affirmed the declaratory judgment relief

as to the film "Un Chant d'Amour" on the merits.

(a) C.D.L.'s Third Counterclaim Pleads A Compulsory Counterclaim. A Refusal To Entertain Jurisdiction To Hear A Compulsory Counterclaim Which Is Properly Pleaded Is Error As A Matter Of Law.

The facts pleaded in CDL's Third Counterclaim demonstrate quite clearly that the Complaint and Counterclaim arise out of a common nucleus of operative facts. The issue of the "obscenity" of specific films are both a defense to the state libel and slander lawsuit and are the primary issue in the "unfair trade practices" state cause of action pleaded as the counterclaim. Southern Construction Co., Inc., et al. v. United States for the Use of Samuel J. Pickard, 371 U.S. 57 at 60 (1962); Dragor Shipping Corp. v. Union Bank Car

Co., 378 F.2d 241 at 244 (9th Cir. 1967); Magna Pictures Corp., et al. v. Paramount Pictures Corp., et al., 265 F.Supp. 144 at 152-153 (U.S.D.C. C.D. Calif. 1967); United Artists Corp. v. Masterpiece Productions, Inc., 221 F.2d 213 at 216 (2nd Cir. 1955); Warshawsky Co. v. Arcala National Corporation, 552 F.2d 1257 at 1261 (7th Cir. 1977). CDL's counterclaim is therefore compulsory and require "resolution in a single lawsuit of all disputes arising out of common matters" Southern Construction Co. v. U.S., 371 U.S. 57 at 60 (1962). See Magna Pictures Corp., supra, at pages 152-153, where the Court stated:

> "The test for the compulsory nature of a counterclaim is succinctly stated in Barron and Holtzoff, Vol. IA, Section 394. The test is four-fold and requires that the claim must:
>
> > '(1) Arise "out of the transaction or occurrence that is the subject matter of the opposing party's claim;"

> (2) be matured and owned by the pleader at the time he serves his pleading;
>
> (3) not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction; and
>
> (4) not have been, at the time the original action was commenced, the subject of another pending action.'"

The "abuse of discretion" standard which customarily governs Rule 13(f) motions is materially affected where a determination is made that the proposed counterclaim qualifies as a "compulsory" counterclaim. Here the "justice requires" proviso of Rule 13(f) weighs in the balance as to what constitutes an "abuse of discretion". The factor which requires the trial court to entertain jurisdiction of a compulsory counterclaim when it is properly pleaded is the jeopardy which may attach due to the "res judicata" effect such a federal judgment would later have where a

compulsory counterclaim is not tried in tandem. The importance of that factor is brought into focus when, as here, the federal jurisdiction is based upon diversity of citizenship and an objection is timely made that a federal judgment in favor of the plaintiff will thereafter act as a bar to the state claim under the "res judicata" principles of the State of California Courts. In California, the cause of action under Business and Professions Code section 17200 et seq. would have to be pleaded as a counterclaim or be barred. See Point I, supra, at pages 23-24 and Point II, supra, at pages 32-34.

In a diversity case, the failure of the federal trial court to entertain jurisdiction of a properly pleaded compulsory counterclaim is subject to attack on the ground that the trial court has erred as a matter of law in

failing to apply the principles of the Erie Doctrine.

(b) The Trial Court's Order Which Denied C.D.L.'s Motion For Leave To File The Proposed Counterclaim On The Grounds Of "Oversight, Inadvertence, Or Excusable Neglect" And That Justice Requires The Same, Was An Abuse Of Discretion.

F.R.C.P. 15(a), which governs amendments to pleadings, provides in its relevant part as follows:

> a. Amendments . . . Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. (our emphasis).

F.R.C.P. 13(f), which governs an amendment to a pleading by adding an omitted Counterclaim provides in its relevant part as follows:

> "(f) Omitted Counterclaim. When a pleader fails to set up a counterclaim through oversight, inadvertence, or

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> excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment." (our emphasis).

It is the philosophy of the Federal Rules that amendments of the pleadings are to be freely granted, even after a complaint has been dismissed. Moore's Federal Practice: Federal Civil Rules - Part I (Matthew Bender, 1975), page 465.

In Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962), the United States Supreme Court held that it was error for the Court of Appeals to affirm the District Court's denial of plaintiff's motion to vacate the judgment of dismissal for failure to state a claim in order to allow the complaint to be amended. The Court states:

> "Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires,' this mandate is to be heeded. See generally, 3 Moore, Federal Practice (2d ed. 1948), paragraphs

> 15.08, 15.10. If the underlying facts or circumstances relief upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason - such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. - the leave sought should, as the rules require, be 'freely given.'"

CDL contends that, in the case of an "omitted counterclaim" which qualifies as a "compulsory" counterclaim, the "justice requires" proviso of F.R.C.P. 15(a) and 13(f) is controlling and requires that, upon these trial facts, the amendment must be allowed for the following reasons:

> (1) The omitted counterclaim qualifies as a "compulsory counterclaim" under Magna Pictures Corp. v. Paramount Pictures Corporation, supra;
>
> (2) The Erie Doctrine requires the federal trial court to apply the substantive law of the State of

California which, under the "primary right" doctrine of res judicata, requires that the issue of the "obscenity" of the films alleged in CDL's Third Counterclaim against Oak, pursuant to its cause of action under Business and Professions Code section 17200 et seq., which duplicates the issue of "obscenity" of the motion picture films which will be asserted in its defense of the California libel and slander lawsuit, must be asserted as a counterclaim in the libel or slander lawsuit or the federal judgment will act as a bar (See Point

(3) The Trial Court has not been inconvenienced. No discovery has taken place and it has been agreed by the parties with the Court's concurrence that the matter of depositions and status conferences would be held in abeyance to await the outcome of CDL's effort to plead a valid counterclaim (See Statement of Facts at paragraph 4 on page 10, supra; and Appendix A to this Brief.

(4) Oak has not been unfairly prejudiced in getting its case tried, but to the contrary has agreed that the counterclaim issue should be finally ruled upon before discovery or further status conferences would be undertaken.

(5) Counterclaimant CDL has expended a substantial amount of time and sums of money in preparing the autoptical evidentiary Exhibits

3A through 3F, 5A through 5E, and 6A through 6D which were pleaded by incorporation in the counterclaim and which, while necessary for the discovery process to be employed in the Oak lawsuit, were essential to a precise articulation of the counterclaim.

(6) Exhibits 3, 5 and 6 to the Counterclaim autoptically establish that the films which Oak is exhibiting on television are "obscene per se", i.e., "reasonable minds would not differ and all would agree the subject matter is hard-core pornography." See Morris v. U.S. 257 A.2d 341 (1969) for the test for "obscene per se" and Mitchum v. State of Florida, 251 So.2d 298 (1971), citing United States v. Womack, 111 U.S. App. D.C. 8, 294 F.2d 204, 205-206.

(7) The declaration of CDL's attorney of record (CR 41) amply establishes, upon these trial facts, see pages 10-11, supra, "oversight, inadvertence, and excusable neglect" within the parameters of F.R.C.P. Rule 13(f). The proviso in Business and Professions Code section 17204 and 17535 regarding "any person acting for the interests of itself, its members or the general public" is obscure in that it has erroneously been omitted from the titles of those sections, and was even unknown to the Deputy Los Angeles City Attorney who participated in People v. E.W.A.P., Inc., supra, and had regularly applied such

sections in a different context. (See CR 48a at page 5, line 24 through page 6, line 14).

(8) The case reports do not provide notice of any instance in which a private party has used the provision of that section in the context of the "unlawful trade practice" of "commercial distribution of obscene subject matter".

(9) The Third Counterclaim contains a Declaratory Relief claim which can be justified as a further amendment to the amended second counterclaim (declaratory judgment relief upon a number of theories) which was dismissed by Court order entered 10/2/84 (CR 36) "without prejudice" (See Oak Attorney letter of August 9, 1984 at CR 33), at which time certain exhibits were withdrawn with the Court's concurrence "for the purpose of attaching and incorporating the same by reference in its proposed Third Counterclaim of Defendant Citizens for Decency Through Law, Inc., which is to be filed with the Court in Support of CDL's Motion for Leave to File a Third Counterclaim (CR 35 at page 2, lines 4-8).

III

THE APRIL 15, 1986 ORDER OF THE COURT OF APPEALS WHICH DISMISSED C.D.L.'S APPEAL AS MOOT WAS AN UNCONSTITUTIONAL DEPRIVATION OF C.D.L.'S DUE PROCESS RIGHT OF ACCESS TO THE COURTS.

The refusal of the U.S. District Court to entertain jurisdiction of CDL's counterclaim and the dismissal of CDL's appeal of that ruling on "mootness" grounds, constitutes a clear deprivation of CDL's constitutional right of access to the Courts. See, Rylands v. Shapiro, 708 F.2d 967 at 971 (CA 5, 1983) citing this Court speaking in Wolff v. McDonnell, 418 U.S. 539.

In its counterclaim in the District Court, CDL has attempted to gain access to the federal courtroom as a counterclaimant in a diversity of citizenship lawsuit to establish its legal claim that Oak has been televising hard-core pornographic films in the Phoenix, Arizona and Los Angeles, California areas since February

of 1981 as the regular and only course of business of its "Adults Only ON-TV" program service, and in violation of state and federal obscenity laws.

During that same period, Petitioner's counsel of record in the trial court below, Los Angeles Attorney James J. Clancy, has petitioned the Federal Communications Commission, hereinafter "F.C.C.", for hearings to establish that same fact. See Appendices "H", "J", "L", "N", "O", and "P" to this Petition. Clancy's petitions requested administrative hearings on whether such television transmissions in the Phoenix and Los Angeles areas are transmissions of hard-core pornographic films in violation of federal law which require federal sanctions against Oak.

In the federal district court, U.S. District Judge Thompson, at first, approved a stipulation between the parties which allowed additional time to CDL as the defendant in the diversity action, in which

to plead and marshal the necessary evidence to articulate a counter-claim which would be proper under the federal court's "diversity of citizenship" jurisdiction. Then, when reasonable grounds for federal jurisdiction were discovered, (See Appendix F-3 to this Petition) and the necessary evidence marshalled to articulate a proper state claim under Erie Railroad v. Tompkins, the Court refused to assume jurisdiction on the merits of the claim and disallowed the filing on the grounds that the counterclaim was tardy. Further, upon remand from the Ninth Circuit, during the pendency of the appeal of his initial ruling the only question on "mootness" which Judge Thompson would consider was whether a valid "sale" had been made from Oak to Oak's successor in interest. See R.T. for February 3, at page 15.

Meanwhile, at the administrative level, the F.C.C. gave two contradictory explanations for refusing to assume jurisdiction,

of Attorney Clancy's claim that Oak was transmitting hard-core pornography. On the one hand, it held that:

> "the Commission will not become the national arbiter of program tastes or the national censor of programs contrary to Section 326 of the Communications Act of 1934, as amended." (See Appendix "L" to this Petition at pages L-6);

and, on the other hand, when asked in Chicago, Illinois, to account for the failure of the F.C.C. to assume jurisdiction of Attorney Clancy's Petition regarding the transmissions in the Los Angeles area, while ordering such a hearing on a similar petition against Oak's transmissions over WSNS-TV in Chicago, Illinois, the F.C.C. distinguished the two patently contradictory rulings with an explanation that:

> "the obscenity issue was concurrently before the appropriate U.S. District Court."

CDL contends that the above misrepresentation is tantamount to constructive fraud. (See Appendix "K" at K-5, 6).

At the time the above statement was made by the F.C.C. both the F.C.C. and Oak (Video 44 in Chicago) knew that the obscenity issue was not before the U.S. District Court in Southern California but was on appeal and was about to be argued in the Ninth Circuit Court of Appeals, where Oak was about to plead "mootness" because it had sold its pornographic business to SelecTV of California, a fact of which the F.C.C. also had knowledge! When the F.C.C. hearings on "Oak" in Chicago are studied in the light of the Los Angeles administrative and judicial proceedings against "Oak", one comes away with a firm conviction that the federal government has been "caught" in a classic display of the old "shell game". See In re Application of Herriscope of Chicago, Inc., et al., a Joint Venture d/b/a Video 44 For Renewal of License of Station WSNS-TV, Channel 44, Chicago, Ill. 58 R.R.2d 1537 and Appendices "N", "O", "P" and "J-25 through J-28".

(a) The Nature of The Films Being Broadcast By Television And Pleaded By Incorporation As Time And Motion Studies In C.D.L.'s Counterclaim Provides Autoptical Evidence That ON-TV And Its Successors In Interest, ON-SelectTV, And SelecTV Of California, Are Succeeding Where Hans Christian Anderson's Fairyland Tailors Failed.

Wigmore in his treatise on Evidence coined the term "autoptic preference" for demonstrative evidence, such as photographs whose evidentiary value lies in considerable part in the demonstration of matters which are readily perceived by the senses. 4 Wigmore, Section 1150. Such evidence provides the "gut feeling" about which Associate Justice Stewart wrote in Jacobellis v. Ohio, 378 U.S. 184, 197 (1964):

> "under the First and Fourteenth Amendments, criminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succees in intelligibly doing so. But I know it when I see it. . . ." (Our emphasis.)

The time and motion studies of the films "Taboo" and "Satisfactions" which were pleaded by incorporation in CDL's

Counterclaim as Exhibits 5A, 5B, 6A and 6B are being lodged with the Clerk of this Court as subject matter which has been incorporated by reference in a Supplemental Declaration filed with this Court in Opposition to Oak's claim regarding "mootness" of the relief sought. (See Appendix "H" and "L" to this Petition). These time and motion studies are "autoptic proferences" of CDL's contentious; (1) that ON-TV and its successors in interest have thus far succeeded in reliving the fairyland adventure of the two tailors in Hans Christian Anderson's fable "The Emperor's New Clothes "; (2) that CDL's appeal is not moot; and (3) that this Court should respond with the child's observation that it is clear beyond doubt that the Emperor has no clothes.

As this Court noted in New York v. P.J. Video, Inc., et al., 475 U.S. ___, 89 L.Ed.2d 871 at 880 (April 22, 1986) in relation to the five search warrant affidavits incorporated as an Appendix to its

opinion at pages 882-885:

> ". . . we think it clear beyond peradventure that the warrant was supported by probable cause to believe that the five films at issue were obscene under New York law. . . ." (Our emphasis.)

In P.J. Video, supra, this Court was referring to the five films "Taboo", "Taboo II", "Debbie Does Dallas II", "California Valley Girls", and "All American Girls", four of which have been televised by "Adults Only ON-TV" and its successors in interest, "ON-SelecTV of California", on the following dates: (See Appendix H-5 at paragraph 8 and Appendix M at the following pages to this Petition).

Taboo - ON-TV December 11, 1983 (M-7)
Taboo - ON-TV September 8, 1984 (M-11)
Debbie Does Dallas II - ON-TV
October 5, 1984 (M-11)
Taboo - ON-TV February 9, 1985 (M-13)
All American Girls - ON-SelecTV
May 2, 1985 (M-13)
California Valley Girls - SelecTV
December 3, 1985 (M-15)
All American Girls - SelecTV
April 12, 1986 (M-16)

(b) By Permitting The Declaration Of Oak Attorney S. James Miller On Collateral Facts In October, 1985 To Interrupt C.D.L.'s Interlocutory Appeal Regarding Its Right To File A Counterclaim On November 15,1984, The Court of Appeals Has Deprived C.D.L. Of Its Constitutional Right Of Access To The Courts.

CDL contends that the sole issue on appeal was CDL's right to counterclaim for a declaratory judgment and injunction on November 15, 1984 against the unlawful business of trading in obscenity, in which Oak (ON-TV) was alleged to be engaged. Under California Business and Professions Code Section 17535 (See Appendix F-12, 13) that remedy extended to anyone who either violated or "proposes to violate" those provisions, which would include an assignee who continued to carry on the same unlawful trade practice. A sale to a third party one year later in October, 1985 would be immaterial and would not "moot" the issues which were formulated at the time the appeal was originally perfected.

CDL does not allege that ON-TV

occasionally exhibits hard-core pornography. It alleged and argued to the district court that Oak and ON-TV and its successors' in interest are engaged in the unlawful business of "trading in obscenity" as its regular and only course of business. See Appendix J at pages J-20 through J-25) and Petition for Rehearing at Appendix K-8 and Reporter's Transcript for February 3, 1986 at pages 7 and 14. Whereas a valid sale would "moot" the injunctive remedy, it would not moot the declaratory judgment remedy in the lawsuit against Oak (ON-TV) and the successor in interest to the same unlawful trade practice.

(c) Conversely, C.D.L. Contends That If The Declaration Of Oak Attorney S. James Miller Is Proper, Then The Supplemental Declaration Of C.D.L.'s Attorney Of Record Clancy On "Mootness" Filed In This Court As Appendix "L" To This Petition, Which Shows That Assignee SelectTV Of California Has Continued The Identical Unlawful Business Of Trading In Obscenity, Demonstrates That C.D.L.'s Appeal Is Not Moot As To C.D.L.'s Right To A Declaratory Judgment Against Oak, And Injunctive Relief Against SelectTV, A Subsequent Assignee, Who Took With Notice.

California attorney James J. Clancy, Attorney of Record in the trial court below, has maintained a continuous surveillance of the television transmissions of Oak ("ON-TV") and its successor in interest, ON-SelecTV and "SelecTV of California", on its "ON-TV Adults Only" program service (Pay TV) in the Southern California area from February of 1981 to the present date. See "Declaration of James J. Clancy in Opposition to Declaration of S. James Miller and Claim Regarding Mootness of Relief Sought" filed in the Court of Appeal on December 3, 1985. (Appendix "H"). See also, the Supplemental Declaration of Robert McGuire filed in this Court at Appendix "L" to this Petition. The titles of the films which have been televised and surveilled in the Los Angeles area for that 5-½ year period are listed at Appendix "M" to this Petition.

Attorney Clancy's surveillances of Oak's television transmissions have been accomplished through the employment of services

of Investigator Robert McGuire who has recorded such television transmissions on video cassette tape.

For the past 10 years Attorney Clancy has also employed Investigator McGuire to conduct weekly sound and photographic surveillances of the hard-core pornographic motion picture films being exhibited at the Mitchell Brothers' Santa Ana Theater in Santa Ana, California in connection with ongoing civil public nuisance abatement litigation involving that theater, as to which Clancy has been the attorney of record. In the Santa Ana litigation, 51 films have been tried to date and 128 are in the Master Calendar department awaiting assignment for trial. All of the 51 films which have been litigated have been adjudged to be "hard-core pornography" under California law. See Exhibit 2 to "Motion to Allow Amicus Curiae City of Santa Ana to Argue" filed on or about March 21, 1986 in People of the State of New York ex rel. Arcara v. Cloud Books, Inc., in the

U.S. Supreme Court, October Term, 1985, No. 85-437.

Attorney Clancy has prepared time and motion studies (one picture taken every 3 seconds) of 150 of the films recently exhibited at the Mitchell Brothers' Santa Ana Theater and identical time and motion studies (one picture taken every 3 seconds) of video cassette tapes with the same title, purchased upon the commercial market. A comparison of the two time and motion studies establishes that the video cassette tapes sold on the commercial market are the identical films exhibited at the Mitchell Brothers' Santa Ana Theater, which uses a 35mm positive print for projection at the theater.

Attorney Clancy has also prepared time and motion studies (one picture taken every 3 seconds) of video tape recordings of certain of the ON-TV, ON-SelecTV, and SelecTV television transcriptions in the Los Angeles area and identical time and

motion studies (one picture taken every 3 seconds) of video cassette tapes with the same title purchased on the commercial market. A comparison of the two time and motion studies for the same titles establishes that the video cassette tapes sold on the commercial market are the identical film exhibited on ON-TV, ON-SelecTV and SelecTV except for the excision of certain scenes from the televised version. Such comparison time and motion studies for the films "Taboo" and "Satisfactions" were pleaded by incorporation as Exhibits 5A, 5B, 6A and 6B to CDL's Third Amended Counterclaim and have been incorporated by reference in the above-described supplemental declaration of McGuire which appears at Appendix "L" to this Petition and are being lodged with the Clerk of the U.S. Supreme Court with the filing of this Petition.

Similar comparison time and motion studies for the films "California Valley Girls" and "All American Girls" have

been incorporated by reference in the above-described supplemental declaration of Robert McGuire at Appendix "L" and are also being lodged with the Clerk of this Court together with the filing of this Petition. Said exhibits and the declaration of investigator Robert McGuire thereon, which has been made a part of Appendix "L" clearly establishes that the assignee SelecTV of California has continued the identical unlawful business of trading in obscenity and that CDL's appeal is not moot.

CONCLUSION

For all of the foregoing reasons, the Judgment of the Court of Appeals for the Ninth Circuit should be reversed and remanded with directions that the Counterclaim be allowed.

DATED: September 8, 1986.

Respectfully submitted,

Bruce A. Taylor
Attorney for Petitioner
CITIZENS FOR DECENCY
THROUGH LAW, INC.

APPENDIX "A"

Order of U.S. District Court entered November 15, 1984, denying leave to file a proposed third counterclaim.

(Reference: Petition at page 2.)

....A-1 thru A-5

X FILED
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SO. DIST. OF CALIF.
BY S. Miller DEPUTY

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NOV. 15, 1984
CLERK U.S. DIST. CT.
SO. DIST. OF CALIF.
BY S. Miller DEPUTY

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

OAK INDUSTRIES, et al., Plaintiffs, v. BRUCE TAYLOR, et al., Defendants.	Civ. No. 83-1018-GT ORDER

On November 5, 1984, this Court heard the oral argument of the parties regarding the motion of the defendants for leave to file a proposed third counterclaim. After careful consideration of this oral argument, together with the papers filed both in support of and in opposition to the motion,

the Court hereby rules that the motion is DENIED.

Under Federal Rules of Civil Procedure 13(a) and 13(b), all counterclaims must ordinarily be filed at the time of the filing of the responsive pleading. In the instant case, therefore, the defendants should have filed any and all counterclaims by July 18, 1983, the day on which they filed their answer to the complaint.

Recognizing their untimeliness, the defendants attempt to rely on Rule 13(f), which permits the belated filing of counterclaims in certain circumstances. Under this Rule--entitled "Omitted Counterclaim"--"when a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of the court, set up the counterclaim by amendment."

The Court does not feel that this is an appropriate case in which to apply

Rule 13(f) to permit the defendants to file their third counterclaim. The sole explanation proffered by the defendants to excuse their late filing is their assertion that they were unaware that they had a cause of action against the putative counterdefendants under California law. In the Court's view, the failure to adequately research a legal proposition does not excuse delay. This is particularly true here, where this is at least the defendants' third attempt to file a counterclaim [1/] and where the attempt was made nearly fourteen months after the counterclaim should have been filed.

Finally, the Court notes that its decision on this matter is in accordance with the law in the Ninth Circuit. See, Ralston-Purina Company v. Bertie, 541

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1. The two prior counterclaims, which were unrelated to the instant counterclaim, were dismissed by the Court on motion by the counterdefendants.

F.2d 1363, 1367 (9th Cir. 1976).

IT IS SO ORDERED.

DATED: November 7, 1984

_____

GORDON THOMPSON, JR.
Chief Judge
United States District
Court

Copies to:

James Clancy
9055 La Tuna Canyon Road
Sun Valley, CA 91352

Robert Russell
1900 California First Bank Bldg.
530 B Street
San Diego, CA 92101

APPENDIX "B"

Order of U.S. Court of Appeals for the Ninth Circuit filed December 3, 1985, remanding case to U.S. District Court on issue whether the appeal is moot.

(Reference: Petition at pages 2 and 15.)

....B-1 thru B-3

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

OAK INDUSTRIES, INC., et al., Plaintiffs-Appellees,	CA# 84-6541
v.	ORDER
CITIZENS FOR DECENCY THROUGH LAW, INC., Defendant-Appellant,	FILED (in Pasadena) December 3, 1985 CLERK, U.S. CT. OF APPEALS

Before: WALLACE, ANDERSON, NORRIS, CJJ

We were advised at oral argument that the underlying case has been dismissed by Oak Industries, Inc. with prejudice. In addition, it was represented that Oak Industries, Inc. has sold the subsidiary corporation which the third counterclaim attempts to enjoin. A factual conflict was alleged as to the validity of the sale. That is a factual matter we cannot decide and the resolution of this issue may be determinative as to whether this appeal is moot.

Therefore, we remand this case to the district court for 56 days to resolve the factual dispute and to rule on whether this issue appealed to us is moot.

After the limited remand, this panel will re-assume responsibility of the appeal.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

OAK INDUSTRIES, INC., et al.,	FILED JAN. 30, 1985 Cathy A. Catterson CLERK, U.S. CT. OF APPEALS
Plaintiffs-Appellees,	NO. 84-6541
v.	DC# CV83-1018 GT Southern California
CITIZENS FOR DECENCY THROUGH LAW, INC.,	O R D E R
Defendant-Appellant.	

Before: WALLACE, ANDERSON, and NORRIS, Circuit Judges

The limited remand in the above matter is extended to February 28, 1986.

APPENDIX "C"

Order of U.S. District Court entered February 26, 1986, determining validity of sale and mootness.

(Reference: Petition at pages 3 and 16.)

....C-1 thru C-4

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__RECEIVED	__RECEIVED
FEB. 24, 1986	FEB. 24, 1986
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SO. DIST. OF CALIF.	SO. DIST. OF CALIF.
BY _____DEPUTY	BY_____DEPUTY

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

OAK INDUSTRIES, INC., and OAK MEDIA DEVELOPMENT CORPORATION, Plaintiffs, v. BRUCE A. TAYLOR, and CITIZENS FOR DECENCY THROUGH LAW, INC., Defendants.	Civ. No. 83-1018 GT(I) ORDER DETERMINING VALIDITY OF SALE AND MOOTNESS [REF. C.A. 84-6541]
RELATED CROSS-ACTION	

This matter came on for hearing on plaintiff's Motion For Determination of Mootness, and pursuant to the Ninth Circuit's Order of December 3, 1985, on February 3, 1986, at 10:30 a.m., in

Courtroom One, the Honorable Gordon Thompson, Jr., Chief Judge, presiding. Plaintiffs were represented by Procopio, Cory, Hargreaves and Savitch, by Thomas R. Laube; defendants were represented by James C. Clancy.

This matter was remanded to this Court by the Ninth Circuit to resolve a factual conflict as to the validity of a purported sale by Oak Industries, Inc. ("OAK") of the television station and adult film programming that are the subject of the third counterclaim. In addition, this Court was directed to determine whether the case has become moot as a result of certain divestments.

After considering the Declaration of S. James Miller, the "Purchase Agreement" between Estrela Communications, Inc. and Oak Broadcasting Systems, Inc., and the "Purchase and Sale Agreement" among others, Oak Industries, Inc. and Selec-TV of

California, Inc., and the other materials presented, the Court finds as follows:

1. The sale by OAK of the television station (Channel 52) and the programming was valid.

2. As a result of the transfer OAK has no ability to control or affect the content of the programming shown on Channel 52, or any other television station, and no control over what uses are made of the programming formerly owned by OAK.

3. There is no unity of interest between OAK and either of the transferees, Estrela Communications, Inc. or Selec-TV of California, Inc.

4. The action against OAK, which seeks declaratory and injunctive relief, is now moot as a result of OAK's divestment of its broadcasting facilities.

The Clerk of the Court is directed to forward a copy of this Order to the Ninth Circuit in connection with C.A. 84-6541.

IT IS SO ORDERED.

Dated: February 24, 1986

GORDON THOMPSON, JR.,
Chief Judge
United States District Court

cc: All counsel

APPENDIX "D"

Order of U.S. Court of Appeals for the Ninth Circuit filed April 15, 1986, dismissing appeal as moot.

(Reference: Petition at page 3.)

....D-1 thru D-2

FILED
APR. 15, 1986
CATHY A. CATTERSON
Clerk
U.S. CT. OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

OAK INDUSTRIES, INC., and OAK MEDIA DEVELOPMENT CORPORATION, Plaintiffs-Appellees, -vs- BRUCE A. TAYLOR, Defendant, CITIZENS FOR DECENCY THROUGH LAW, INC., Defendant-Appellant,	No. 84-6541 D.C. No. CV 83-1018-GT(I) ORDER

Appeal from the United States District Court for the Southern District of California
Gordon Thompson, Jr., District Judge, Presiding
Argued December 3, 1985; Submitted April 1, 1986
Pasadena, California

Before: WALLACE, ANDERSON, and NORRIS, Circuit Judges.

Based upon the uncontested findings and order of the district court entered February 24, 1986, on remand from this court, this appeal is dismissed as moot.

APPENDIX "E"

Order of U.S. Court of Appeals for the Ninth Circuit filed June 10, 1986, denying Petition for Rehearing.

(Reference: Petition at page 3.)

FILED
JUNE 10, 1986

CATHY A. CATTERSON,
Clerk
U.S. CT. OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

OAK INDUSTRIES, INC., and OAK MEDIA DEVELOPMENT CORPORATION, Plaintiffs-Appellees, -vs- BRUCE A. TAYLOR, Defendant, CITIZENS FOR DECENCY THROUGH LAW, INC., Defendant-Appellant.	No. 84-6541 D.C. No. CV 83-1018-GT(I) ORDER

Appeal from the United States District Court for the Southern District of California

Before: WALLACE, ANDERSON, and NORRIS, Circuit Judges.

Appellant's petition for rehearing is denied.

APPENDIX "F"

California Business and Profession Code Sections 17200, 17201, 17202, 17203, 17204, 17205, 17206, 17207, 17208, 17500, 17534.5, and 17535, authorizing "any person" to bring a civil action for a declaratory judgment and injunction against "unlawful trade practices".

(Reference: Petition at pages 5, 28, 52, and 58.)

....F-1 thru F-13

§17200. Definition

As used in this chapter, unfair competition shall mean and include unlawful, unfair or fraudulent business practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (Commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code.

§17201. Person

As used in this chapter, the term person shall mean and include natural persons, corporations, firms, partnerships, joint stock companies, associations and other organizations of persons.

§17202. Specfic or preventive relief

Notwithstanding Section 3369 of the Civil Code, specific or preventive relief may be granted to enforce a penalty, forfeiture, or penal law in a case of unfair competition.

§17203. Remedies and jurisdiction

Any person performing or proposing to perform an act of unfair competition within this state may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.

§17204. Injunction prosecuted by Attorney General, district attorney, or city attorney

Actions for injunction pursuant to this chapter may be prosecuted by the Attorney General or any district attorney or any

city attorney of a city having a population in excess of 750,000, and, with the consent of the district attorney, by a city prosecutor in any city or city and county having a full-time city prosecutor in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation or association or by any person acting for the interests of itself, its members or the general public.

§17205. Cumulative penalties

Unless otherwise expressly provided, the remedies or penalties provided by this chapter are cumulative to each other and to the remedies or penalties available under all other laws of this state.

§17206. Civil penalty for violation of chapter

(a) Any person who violates any provision

of this chapter shall be liable for a civil penalty not to exceed two thousand five hundred dollars ($2,500) for each violation, which shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General or by any district attorney or any city attorney of a city having a population in excess of 750,000, and, with the consent of the district attorney, by a city prosecutor in any city or city and county having a fulltime city prosecutor in any court of competent jurisdiction.

(b) If the action is brought by the Attorney General, one-half of the penalty collected shall be paid to the treasurer of the county in which the judgment was entered, and one-half to the State General Fund. If brought by a district attorney, the penalty collected shall be paid to the treasurer of the county in

which the judgment was entered. If brought by a city attorney or city prosecutor, one-half of the penalty collected shall be paid to the treasurer of the city in which the judgment was entered, and one-half to the treasurer of the county in which the judgment was entered.

(c) If the action is brought at the request of a board within the Department of Consumer Affairs or a local consumer affairs agency, the court shall determine the reasonable expenses incurred by the board or local agency in the investigation and prosecution of the action.

Before any penalty collected is paid out pursuant to subdivision (b), the amount of such reasonable expenses incurred by the board shall be paid to the State Treasurer for deposit in the special fund of the board described in Section 205. If the board has no such special fund, the moneys shall be paid to the State Treasurer. The

amount of such reasonable expenses incurred by a local consumer affairs agency shall be paid to the general fund of the municipality or county which funds the local agency.

§17207. Violation of injunction

(a) Any person who intentionally violates any injunction prohibiting unfair competition issued pursuant to Section 17203 shall be liable for a civil penalty not to exceed six thousand dollars ($6,000) for each violation. Where the conduct constituting a violation is of a continuing nature, each day of such conduct is a separate and distinct violation. In determining the amount of the civil penalty, the court shall consider all relevant circumstances, including, but not limited to, the extent of the harm caused by the conduct constituting a violation, the nature and persistence of such conduct, the

length of time over which the conduct occurred, the assets, liabilities, and net worth of the person, whether corporate or individual, and any corrective action taken by the defendant.

(b) The civil penalty prescribed by this section shall be assessed and recovered in a civil action brought in any county in which the violation occurs or where the injunction was issued in the name of the people of the State of California by the Attorney General or by any district attorney, or any city attorney in any court of competent jurisdiction within his jurisdiction without regard to the county from which the original injunction was issued. An action brought pursuant to this section to recover such civil penalties shall take precedence over all civil matters on the calendar of the court except those matters to which equal precedence on the calendar is granted by law.

(c) If such an action is brought by the Attorney General, one-half of the penalty collected pursuant to this section shall be paid to the treasurer of the county in which the judgment was entered, and one-half to the State Treasurer. If brought by a district attorney the entire amount of the penalty collected shall be paid to the treasurer of the county in which the judgment is entered. If brought by a city attorney or city prosecutor, one-half of the penalty shall be paid to the treasurer of the county in which the judgment was entered and one-half to the city.

(d) If the action is brought at the request of a board within the Department of Consumer Affairs or a local consumer affairs agency, the court shall determine the reasonable expenses incurred by the board or local agency in the investigation and prosecution of the action.

Before any penalty collected is paid out

pursuant to subdivision (c), the amount of such reasonable expenses incurred by the board shall be paid to the State Treasurer for deposit in the special fund of the board described in Section 205. If the board has no such special fund, the moneys shall be paid to the State Treasurer. The amount of such resonable expenses incurred by a local consumer affairs agency shall be paid to the general fund of the municipality or county which funds the agency.

§17208. Limitation of actions

Any action to enforce any cause of action pursuant to this chapter shall be commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section shall be revived by its enactment.

§17500. False or misleading statements generally

It is unlawful for any person, firm, corporation or association, or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services, professional or otherwise, or anything of any nature whatsoever or to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated before the public in this state, or to make or disseminate or cause to be made or disseminated from this state before the public in any state, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatever, any statement, concerning such real or personal property or services, professional or otherwise, or concerning any circumstance or matter of fact con-

nected with the proposed performance or disposition thereof, which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading, or for any such person, firm, or corporation to so make or disseminate or cause to be so made or disseminated any such statement as part of a plan or scheme with the intent not to sell such personal property or services, professional or otherwise, so advertised at the price stated therein, or as so advertised. Any violation of the provisions of this section is a misdemeanor punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding two thousand five hundred dollars ($2,500), or by both.

§17534.5 Remedies or penalties cumulative Unless otherwise expressly provided, the remedies or penalties provided by this

chapter are cumulative to each other and to the remedies or penalties available under all other laws of this state.

§17535. Injunction against violations: Restitution

Any person, corporation, firm, partnership, joint stock company, or any other assocation or organization which violates or proposes to violate this chapter may be enjoined by any court of competent jurisdiction. The court may make such orders or judgments, including the appointement of a receiver, as may be necessary to prevent the use or employment by any person, corporation, firm, partnership, joint stock company, or any other assocation or organization of any practices which violate this chapter, or which may be necessary to restore to any person in interest any money or property, real or personal, which may have been ac-

quired by means of any practice in this chapter declared to be unlawful. Actions for injunction under this section may be prosecuted by the Attorney General or any district attorney, county counsel, city attorney, or city prosecutor in this state in the name of the people of the State of California upon their own complaint or upon the complaint of any board officer, person, corporation or association or by any person acting for the interests of itself, its members or the general public.

APPENDIX "G"

Declaration of Oak Attorney S. James Miller filed in the U.S. Court of Appeals for the Ninth Circuit on November 22, 1985, regarding mootness of relief sought.

(Reference: Petition at page 15.)

....G-1 thru G-3

ROBERT G. RUSSELL, JR.
ANTONIA E. MARTIN
PROCOPIO, CORY, HARGREAVES
AND SAVITCH
530 "B" Street, Suite 1900
San Diego, California 92101

(619) 238-1900

Attorneys for OAK INDUSTRIES, INC., and
OAK MEDIA DEVELOPMENT CORPORATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CITIZENS FOR DECENCY THROUGH LAW, INC., Appellant, v. OAK INDUSTRIES, INC., and OAK MEDIA DEVELOPMENT CORPORATION, Appellees.	U.S.C.A. No. 84-6541 U.S.D.C. CV 83-1018-GT Southern California

DECLARATION OF S. JAMES MILLER

REGARDING MOOTNESS OF RELIEF SOUGHT

I, S. JAMES MILLER, declare:

1. I am the Vice President and General counsel for Oak Industries, Inc. ("Oak"), a defendant herein.

2. On September 26, 1985 the Federal Communications Commission approved the transfer of the license held by Oak for broadcasting over Channel 52 in the Los Angeles area to Estrella Communications, Inc. All time for appeal or challenge to this order has now passed and the order is final and not appealable.

3. The agreement between the parties for sale of the station to Estrella Communications, Inc. closed escrow on October 11, 1985 and Oak Industries, Inc. and its affiliates and subsidiaries have had no further connection with broadcasting over Channel 52 since that date. Channel 52 is not presently braodcasting, but will come on the air as a 24 hour Spanish language station as soon as programming is arranged.

4. Oak, its affiliates and subsidiaries are out of the subscription television business in all markets, and have no remaining links to the "adult programming"

which appellant seeks to enjoin.

5. Any request for injunctive relief against Oak or its affiliates or subsidiaries is now moot since these entities are not in a position to control the content of program material broadcast in any market.

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 22, 1985 at Rancho Bernardo, California.

S. JAMES MILLER

APPENDIX "H"

Declaration of CDL Attorney James J. Clancy filed in U.S. Court of Appeals for the Ninth Circuit on December 3, 1985, in opposition to declaration of Oak Attorney S. James Miller and claim regarding mootness of relief sought.

(Reference: Petition at pages 15, 51, 56, 57, and 60.)

....H-1 thru H-8

James J. Clancy
9055 La Tuna Canyon Road
Sun Valley, CA 91352
(818) 352-2069

Carol A. Clancy
2331 W. Royal Palm Rd. #105
Phoenix, AZ 85021
(602) 995-2600

Attorneys for Appellant
CITIZENS FOR DECENCY
THROUGH LAW, INC.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CITIZENS FOR DECENCY THROUGH LAW, INC., Appellant, v. OAK INDUSTRIES, INC., and OAK MEDIA DEVELOPMENT CORPORATION, Appellees.	U.S.C.A. No. 84-6541 U.S.D.C. CV 83-1018-GT Southern California

DECLARATION OF JAMES J. CLANCY IN OPPOSITION TO DECLARATION OF S. JAMES MILLER AND CLAIM REGARDING MOOTNESS OF RELIEF SOUGHT

I, JAMES J. CLANCY, declare and say:

1. I am one of the attorneys of record for the Appellant.

2. I am duly licensed to practice law

in the State of California, and have specialized in obscenity law and obscenity litigation for the past 20 years. I am familiar with the decisions of the United States Supreme Court relating to the regulation and control of "obscene" material as that term is defined by federal and state law.

3. I make this declaration in opposition to the declaration of S. James Miller, regarding mootness of relief sought, executed by S. James Miller on November 22, 1985 and served by mail on the Appellant herein on November 22, 1985.

4. A true copy of a Daily Variety article, dated August 1, 1985 entitled, "Oak Media's Transfer of ON TV Subs To SELECTV, KBSC-TV Sale Hit Snags" is attached as Exhibit 3 to this declaration and pleaded by incorporation herein as though appearing herein in full.

5. On July 31, 1985, at or about 10:00 a.m., I appeared as a witness in Room

226, Dirksen Senate Office Building and gave unsworn testimony to the U.S. Senate Sub-Committee on Criminal Law which was conducting public hearings on Senate Bill 1090. The subject of that testimony was "The Background History of the Appearance of Unlawful, Hard-Core Pornography on Cable Television". My testimony in that regard was substantially the same as that which appears in a 12 page document entitled "Statement of James J. Clancy, Attorney at Law, on Senate Bill 1090 and The Background History of the Appearance of Unlawful, Hard-Core Pornography on Cable Television", a copy of which was filed with said Sub-Committee, and a true copy of which (less exhibits) is attached as Exhibit 1 to this declaration and pleaded by incorporation as though appearing herein in full.

6. On October 16, 1985, at or about 7:30 p.m., I appeared as a witness at the Hall of Administration, 500 West Temple,

Los Angeles and gave unsworn testimony to the U.S. Department of Justice, Attorney General's Commission on Pornography which was conducting public hearings. The subject of that testimony was "The Background History of the Appearance of Unlawful, Hard-Core Pornography on Cable Television". My testimony in that regard was substantially the same as that which appears in a 12 page document entitled, "Statement of James J. Clancy, Attorney at Law, on the Background History of the Appearance of Unlawful Hard-Core Pornography on Pay and Cable Television", a copy of which was filed with said Commission, and a true copy (less exhibits) of which is attached as Exhibit 2 to this declaration and pleaded by incorporation herein as though appearing herein in full.

7. The statements appearing in Exhibits 1 and 2 are an accurate account of the facts therein testified to by me,

and are presented to this Court as an "offer of proof" of what appellant's evidence in the trial court would be on the questions whether "ON-SELECT TV", as "ON-TV's" successor in interest, would be bound by a judgment on the counterclaim, which awarded a declaratory judgment and injunction and other relief as prayed for in Appellant's counterclaim, see C.R. at pages 23-24, and whether "ON-SELECT TV", as the successor in interest to "ON-TV" can now be added as an additional party defendant on Appellant's counterclaim.

8. To the date of filing this declaration, Declarant has continued to conduct and maintain a continuous video tape surveillance of the "Adults Only" programs being broadcast and received by Declarant under the original "ON-TV" subscription, which was contracted for in 1981. Those surveillances establish that "ON SELECT TV", the alleged successor in interest to

"ON-TV", is transmitting, as its regular course of business, "Adults Only" films of the same character and content as previously broadcast by "ON-TV", many of which carry the same title as films which have been broadcast by "ON-TV" on previous programs. See the "ON SELECT TV" programs for April 28th thru June 3, 1985; June 9th thru July 20, 1985; July 21st thru August 31, 1985; September 1st thru October 12, 1985, the relevant portions of which are attached as Exhibit 4 to this declaration and pleaded by incorporation herein as though fully appearing herein in full.

9. Declarant avers and contends that the declaration of S. James Miller executed on November 22, 1985 does not establish the "mootness" of injunctive relief as claimed by Oak Attorney Antonia E. Martin (see para 2 on page 1 of her letter, dated November 22, 1985). On the contrary, it demonstrates the wisdom of

the Ninth Circuit's rule which authorizes an interlocutory appeal of an order which denies the filing of a counterclaim which authorizes injunctive relief. Had the counterclaim been filed, the ancillary injunctive remedy therein allowed would have precluded "ON-TV" from completing the sales transaction without answering the public challenge as to whether Oak Industries, Inc. was involved in an unlawful business practice. Although the trial court's arbitrary action in denying the filing of the counterclaim has harmed the Appellant to some extent, the right in the Ninth Circuit to a quick interlocutory appeal has minimized that harm and has prevented the public challenge from becoming a stale claim which, due to an inordinate passage of time, could not be litigated.

I declare under penalty of perjury that the foregoing is true and correct.

////

Executed on December 2, 1985, at Sun Valley, California.

_____

James J. Clancy
Attorney for Appellant

APPENDIX "I"

Declaration of Oak Attorney S. James Miller filed in U.S. District on or about January 15, 1986.

(Reference: Petition at page 15.)

....I-1 thru I-4

ROBERT G. RUSSELL, JR.
THOMAS R. LAUBE
PROCOPIO, CORY, HARGREAVES
AND SAVITCH
530 B Street, Suite 1900
San Diego, California 92101
Telephone: (619) 238-1900

Attorneys for Plaintiffs OAK INDUSTRIES, INC. and OAK MEDIA DEVELOPMENT CORPORATION

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

OAK INDUSTRIES, INC. and OAK MEDIA DEVELOPMENT CORPORATION, Plaintiffs, v. BRUCE A. TAYLOR and CITIZENS FOR DECENCY THROUGH LAW, INC., Defendants.	CASE NO. 83-1018-GT(I)
	DECLARATION OF S. JAMES MILLER
	DATE: Feb. 3, 1986 TIME: 10:30 a.m. COURTROOM: 1
Related Cross-Action	

I, S. James Miller, declare as follows:

1. I am the Vice-President and General Counsel of Oak Industries, Inc. ("OAK"). I am familiar with the business activities of OAK in general, and the ownership and

control of Channel 52, a television station.

2. At the time this lawsuit was filed OAK was responsible for, and had the ability to control, the content of programming for Channel 52. At that time OAK offered adult films to its subscribers, along with other types of films.

3. However, OAK no longer has any right, title, license or interest in Channel 52. All of OAK's rights to the station were transferred to Estrela Communications, Inc. (A true copy of the Purchase Agreement is attached to this declaration marked Exhibit A). The Federal Communication Commission approved the transfer. OAK did not retain any security interest in Channel 52.

4. I have read the "Declaration of James S. Clancy In Opposition To Declaration of S. James Miller, etc." ("CLANCY Declaration").

5. Paragraph 4 of the CLANCY

Declaration may be accurate as far as it goes. However, whatever "snags" cropped up in the sale were eventually resolved and sale was concluded.

6. Paragraph 7 of the CLANCY Declaration is misleading if it implies that SELECT TV and OAK have any unity of interest in either Channel 52 or the programming that was owned by OAK. As mentioned in the third paragraph of this declaration, OAK's license to operate Channel 52 was transferred to Estrela Communications, Inc. Further, OAK's programming, which includes a variety of films, including adult films, was transferred to SELECT TV. A true copy of the Purchase and Sale Agreement between OAK and SELECT TV is attached to this declaration marked Exhibit B.

7. As a result of Exhibits A and B to this declaration, OAK no longer has the ability to control or affect the

programming on Channel 52, or on any television station. If the adult films previously shown by OAK are being shown by some other station, such as SELECT TV, that is entirely beyond OAK's control or influence.

8. OAK does not have any ownership interest, or the right to control, Estrela Communications, Inc. or SELECT TV. Since the transfer of Channel 52, OAK has not had the ability or right to control the programming of any television station. None of OAK's officers or directors are officers or directors of Estrela Communications, Inc.

9. I have personal knowledge of the facts set forth in this declaration, and if I were called as a witness I would testify in accordance with it.

I declare under penalty of perjury under the laws of California that the foregoing is true and correct.

DATED: January 15, 1986.

S. James Miller

APPENDIX "J"

CDL "Memorandum of Points and Authorities in Opposition to Plaintiff's Claim of Mootness" filed in U.S. District Court on January 27, 1986.

(Reference: Petition at pages 16, 51, 54, and 59.)

....J-1 thru J-31

James J. Clancy
9055 La Tuna Canyon Road
Sun Valley, California 91352
Telephone: (818) 352-2069

Bruce A. Taylor
2331 W. Royal Palm Road
Phoenix, Arizona 85021
Telephone: (602) 995-2600

Attorneys for Defendant
Citizens for Decency through Law, Inc.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

OAK INDUSTRIES, INC., and OAK MEDIA DEVELOPMENT CORPORATION, Plaintiffs, v. BRUCE A. TAYLOR and CITIZENS FOR DECENCY THROUGH LAW, INC., Defendants-	CASE NO. 83-1018-GT(1)
	MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' CLAIM OF MOOTNESS.
	DATE: Feb. 3, 1986
	TIME: 10:30 a.m.
	COURTROOM: 1 (HON. GORDON THOMPSON, JR.)
Related Counter-Claim	

I

INTRODUCTION: CHRONOLOGY OF HISTORICAL EVENTS INVOLVING COUNTERCLAIMANT CITIZENS FOR DECENCY THROUGH LAW, INC. ("CDL"), AND COUNTERDEFENDANTS OAK INDUSTRIES, INC., ET AL. ("OAK")

1. February 1981

   Video tape surveillance of Oak's "ON-TV Adults Only" films being exhibited by Oak on Channel 52 (Glendale, California) commenced by Attorney James J. Clancy. Continuous to present date (5 years) on same subscription agreement, including Select TV's exhibitions in 1985 on Channel 52.

2. April 1981

   Videotape surveillance of Oaks' "ON-TV Adults Only" films being exhibited on Channel 15 (Phoenix, Arizona) commenced by Attorney James J. Clancy. Discontinued in June 1983 upon discontinuance of "ON-TV Adults Only" service by

Channel 15. Station sold to Scripps Howard for $10,500,000.

3. April 1983

Attorney James J. Clancy complaint to U.S. Attorney McDonald (Phoenix, Arizona) who agrees to intervene on "indecency" issue in state lawsuit between Oak and Channel 15 owner. Parties remove "indecency" issue from their state lawsuit. McDonald ousted of intervention issue.

4. May 31, 1983

Oak files its "Complaint for Damages for Slander and Libel" in U.S. District Court (San Diego) against Bruce Taylor and CDL. No. CV-83-1018 GT.

5. July 18, 1983

CDL and Bruce Taylor answer Complaint and file a "Counterclaim for Damages for Slander and Libel".

6. September 1, 1983

Attorney James J. Clancy files a Petition for Denial of Renewal of License of KNXV-TV Channel 15 (Phoenix, Arizona) with F.C.C. alleging continuous surveillance since April 1981 and continuous exhibition of obscene films on "ON-TV Adults Only" program as regular course of conduct.

7. October 13, 1983

CDL and Bruce Taylor's First Counterclaim (Slander and Libel) is dismissed with prejudice by U.S. District Judge Gordon Thompson.

8. November 1, 1983

Attorney James J. Clancy files a Petition for Denial of Renewal of License of KBSC-TV Channel 52 (Glendale, California) with F.C.C. alleging continuous exhibition of obscene films on "ON-TV Adults

Only" program as regular course of conduct.

9. February 6, 1984

U.S. District Court Judge Gordon Thompson (San Diego) in CV-83-1018 GT grants CDL leave to file a second counterclaim (declaratory relief). In oral argument and in points and authorities, CDL argues need for right to counterclaim for declaratory judgment so that issue may be settled conclusively and preclude extortive effect of original lawsuit.

10. July 24, 1984

Hearing in U.S. District Court (San Diego) CV-83-1018 GT. U.S. District Judge Gordon Thompson grants Oak's Motion to Dismiss Amended Second Counterclaim (declaratory relief).

11. August 17, 1984

James C. McKinney, Chief of the Mass Media Bureau of Federal Communication Commission (F.C.C.) advises James J. Clancy by letter that Clancy, a California resident, had no "Standing" to file the petition to deny license renewal of Phoenix KNXV-TV Channel 15 (Phoenix). Pleading was dismissed on ground Clancy was not a viewer of KNXV-TV or residing within its service area.

12. September 26, 1984

U.S. District Court Judge Gordon Thompson (San Diego) signs an order dismissing CDL's Second Counterclaim (declaratory relief). Court rejects proposed "with prejudice" language in order submitted by Oak's attorney.

13. October 5, 1984

CDL files a notice of motion for leave to file a third counterclaim for injunctive relief under Business and Professions Code Section 17,200 (unfair trade practices) and declaratory judgment relief under C.C.P. Section 1060. Jurisdiction based upon federal diversity of citizenship.

14. November 5, 1984

Hearing in U.S. District Court in CV 83-1018 GT. U.S. District Judge Gordon Thompson enters an order denying the motion on November 15, 1984, citing Ralston-Purina Co. v. Berke, 541 F.2d 1363, 1367 (9th Cir. 1976).

15. December 13, 1984

CDL files a Notice of Appeal (interlocutory) based upon In-A-Floor Safe v. Die Bolt Safe

and Lock Co., 91 F.2d 341 at 342 (9th Cir. 1937). An order denying leave to file a counterclaim praying for an injunction is an interlocutory order tantamount to one refusing an injunction and is appealable under 28 U.S.C. § 227 in Ninth Circuit.

16. January 31, 1985

Oak and Select TV enter into agreement for sale of "ON-TV Adults Only" over-the-air subscription television service assets, including Oak's agreements with customer subscribers, programming and film licenses for $3,000,000.

17. February 1, 1985

Agreement between Oak and Select TV that "ON-TV Adults Only" subscription service will continue to be broadcast over Channel 52 for one year (February 1, 1985-January

31, 1986) at cost of $110,000 per month. Subscription service is thereafter continued by Select TV under original Oak subscriber's agreement on Channel 52 and subscriber service is individually shifted to Channel 22 (See Broadcast Agreement Exhibit C of Contract of Sale). "ON-TV Adults Only" subscribers are gradually (daily) shifted from Channel 52 to Channel 22.

18. May 3, 1985

Oak and Estrela Communications, Inc., enter into agreement for sale of assets and assignment of license issued by F.C.C. to Channel 52, KBSC-TV (Glendale, California). Estrela states it does not intend to continue exhibiting "ON-TV Adults Only" program.

19. July 31, 1985

Attorney James J. Clancy statement to Senate Judiciary Committee "on background history of the appearance of unlawful, hard-core pornography on cable television". Statement alleges: (1) Fraud in transfer of "ON-TV Adults Only" subscription list to Select TV, and of "ON-TV Adults Only" broadcasts from Channel 52 to Channel 22, and in renewal of Channel 52 license by F.C.C.; (2) F.C.C.'s dismissal of Attorney Clancy's September 1, 1983, petition for denial of renewal of license of KNXV-TV (Channel 15, Phoenix) on grounds of "lack of standing"; (3) F.C.C.'s twenty (20) month of silence and its failure to respond to Attorney Clancy's identical November 1, 1983, petition for denial of

renewal of license of KBSC-TV (Channel 52, Glendale); and (4) Increase in grossness of "ON-TV Adults Only" hard-core pornographic transmissions by Oak after filing of petition by Attorney Clancy.

20. September 26, 1985

Declaration of Oak attorney S. James Miller, dated November 22, 1985, filed in Court of Appeals states that "on September 26, 1985 the Federal Communications Commission approved the transfer of the license held by Oak for broadcasting over Channel 52 in the Los Angeles area to Estrela Communications Inc."

21. October 16, 1985

Attorney James J. Clancy statement to U.S. Attorney General's Commission on Pornography "on the background history of the

appearance of unlawful, hard-core pornography on pay and cable television." Statement alleges: (1) fraud in transfer of "ON TV Adults Only" subscription list to SelectTV, and of "ON TV Adults Only" broadcasts from channel 52 to channel 22, and renewal of Channel 52 license by F.C.C.; (2) FCC's dismissal of attorney Clancy's September 1, 1983 Petition for denial of renewal of license of KNXV-TV (Channel 15 Phoenix) on grounds of "lack of standing" and; (3) FCC's twenty (20) month's silence and failure to respond to attorney Clancy's identical November 1, 1983 petition for denial of renewal of license of KBSC-TV (Channel 52 - Glendale); (4) increase in grossness of hard-core pornography transmitted

on "ON TV Adults Only" (pay TV) and (5) Introduction (spread) of similar transmissions over cable TV, because of no opposition from F.C.C.

22. October 16, 1985

F.C.C. representative Thomas R. Herwitz testifies before U.S. Attorney-General's Commission on Pornography in Los Angeles. Asked what the F.C.C. would do to a complaint in the nature of Clancy's Petition, F.C.C. representative Herwitz states F.C.C. will only take action if the Petition presents evidence that the station has broadcast an obscene film which has been adjudicated to be obscene in the local courts where the Station is located. (See testimony of Herwitz on October 16, 1985, copy of which is attached as

Exhibit 1 to these points and authorities. See item 12 and 15 above where CDL is forced to appeal the refusal of the U.S. District Court to hear that issue in the U.S. District Court as a "Third Counterclaim" in San Diego, under its diversity of citizenship jurisdiction.

23. December 2, 1985

Hearing in U.S. District Court in CV 83-1018 GT on Oak's Motion to Dismiss with prejudice under FRCP section 41(a)(2) on "mootness" grounds, in that (1) Oak has sold Channel 52 and transferred the FCC license on September 26, 1985 to Estrela; (2) Oak has ceased broadcasting "ON TV Adults Only" Films; (3) Channel 52 now has no programming for "Adults only films," which have been shifted to

Channel 22. CDL supports dismissal, but requests that it be conditioned upon payment of costs including attorney fees for bad faith filing. During arguments, Judge Nielsen states that defendants' costs incurred are a matter for the counterclaim in the 9th Circuit. Judge Nielsen agrees to examine exhibits but a check with the U.S. District Court clerk shows exhibits are not in the U.S. District Court and are in the Court of Appeal.

24. December 3, 1985

Court of Appeal, 9th Circuit enters an order in Oak Industries Inc. v. CDL, CA 84-6541 remanding case to U.S. District Court for 56 days "to rule on whether this issue appealed to us in moot." CDL understands remand is jurisdictional because

U.S. District Court has 60 day jurisdiction after entry of judgment.

25. December 12, 1985

Order of dismissal with prejudice and judgment of U.S. District Judge Nielsen is entered in Civ. No. 83-1018-GT. Judge Nielsen's order does not condition the dismissal of the case on Oak's payment of defendant's costs. Each side is to bear its own costs.

26. January 11, 1985

Expiration of 30 day period for filing Notice of Appeal under FRAP rule. CDL is precluded from filing Notice of Appeal during 30 day period because of Ninth Circuit's remand for 56 days to decide factual question. CDL's filing of Notice of Appeal would oust U.S. District Court of its jurisdiction.

On February 3, 1985, CDL will petition U.S. District Court for leave to file Notice of Appeal from the December 12, 1985 Judgment within the 60 day period (prior to February 10, 1986) to preserve its right to appeal the dismissal of its declaratory judgment counterclaim if the Ninth Circuit does not follow precedent and rule in its favor in In a Floor Safe Co. v. Die Bolt Safe and Lock Co. (supra).

II

THE FALLACY OF OAK'S CLAIM OF MOOTNESS

At the oral argument in the Court of Appeal on December 3, 1985, Oak argued that CDL's appeal from this Court's denial of CDL's Motion for Leave to File the "Third Counterclaim of Defendant Citizens for Decency through

Law, Inc., For Relief Pursuant to California Business and Professions Code Sections 17200 et seq. and California Code of Civil Procedure Section 1060 (Declaratory Judgment Statute)" is moot because:

(1) Oak has dismissed its original "Complaint for Damage for Slander and Libel" with prejudice, and

(2) Oak has sold Channel 52 to Estrela Communications Inc. and has sold its interest in the programming "system" "ON TV Adults Only" (subscription list, programming, and film licenses etc.) to Select TV.

The Court of Appeal's Order of December 3, 1985 remanded the cause to the U.S. District Court for a resolution of the "factual dispute" regarding the "mootness" of the appeal.

In principle, Oak's argument to the Court of Appeal is that, assuming that CDL were to prevail on the issues in the briefs which are before the Court of Appeal and that the Court of Appeal were to rule: (1) that the Interlocutory Appeal was proper under In A Floor Safe Co. v. Die Bolt Safe and Lock Co., 91 F.2d 341 (CA9, 1937); and (2) that the CDL's counterclaim against Oak (alleging a statutory cause of action for an injunction and declaratory judgment against "unlawful business practices" and "false and misleading advertising" and jurisdictional facts for diversity of citizenship) should have been filed, nevertheless the appeal is moot because, upon remand, the counter-claim would have to be dismissed upon grounds of "mootness" because an injunction against Oak would have no force or effect. CDL submits that Oak's argument is clearly

fallacious. The third counterclaim is not pleading for a declaratory judgment against a specific film or limited to Oak's ownership of Channel 52. It is pleaded against a programming "system" that is, an "unfair trade practice," being a continuing course of conduct. CDL's prayer for relief in the counter-claim is not limited to a request for an injunction against Oak; the request is for a declaratory judgment and an injunction and restitution of the counterclaims costs against the system, the unfair trade practice, and the continuing course of conduct.

CDL's contentions as to the scope of the diversity of citizenship, declaratory relief sought in the counterclaim is set forth in it's counter-claim at paragraph 30 on page 18 lines 14 through page 22 line 23. See

Court Record 42 (CR 42). CDL's prayer for relief pursuant to the counterclaim is set forth at page 23 line 1 through page 24 line 22. That relief includes, at paragraph 1: "declaratory judgment relief under California Business and Professional Code sections 17203, 17204, 17205, and 17535, California Code of Civil Procedure section 1060, Zeitlin v. Arnebergh, supra, Landau v. Fording, supra, and People v. E.W.A.P. Inc., supra, (page 23 lines 5-9). At paragraph 2 of the prayer for relief, CDL seeks an adjudication "that the ten (10) films...are obscene under California and federal law; that such films are representative examples of the content and character of the motion picture films which Channel 52 has been exhibiting as a regular course of conduct on it's 'ONTV Adults Only' program from February 8, 1981 to the

present date, and that said 'ON TV Adults Only' program is an "unlawful business practice..." (page 23 lines 10-19). At paragraph 3 of the prayer for relief, CDL seeks a declaration that, under California Penal Code section 186 et seq., the joining together in consent of persons who act in, produce, manufacture, distribute, sell and exhibit obscene films, as a regular and continuing business, is 'organized crime',,, and that CDL's declaration that counter-defendants are engaged in organized crime is not libelous, but rather is a true statement, as a matter of law. (page 23 lines 23-page 24 line 7). At paragraph 4 of the prayer for relief, CDL seeks an injunction against the "counterdefendants and the additional defendant on the counterclaim be permanently enjoined from engaging in

such unlawful business practice..." (page 24 lines 8-10). The allegations set forth in CDL's counterclaim clearly support the relief requested.

CDL submits that Oak's argument is meritless. Oak's argument is that, were the judgment of the Court of Appeal to be that the cause should be remanded to the U.S. District Court with direction that CDL's motion be granted, that the District Court's order be vacated and that CDL be permitted to file the counterclaim, it could upon remand, "moot" CDL's counterclaim by selling off its interest in Channel 52 and selling its interest in the "system", "ON TV Adults Only," to SelectTV. That contention is clearly fallacious. A cause of action against a party and liability therefore cannot be defeated by an assignment of one's interest. The closest analogy is an assignment of an

interest where the underlying cause of action is alleged to be a public nuisance. Oak's argument would be more plausible had Oak elected to discontinue their "ON TV Adults Only" programming system and service. The facts are otherwise, here, where Oak's own proof is that the entire service (subscription agreements, programming of adult fare, film licensing etc.) was sold to SelectTV for $3,000,000. CDL's offer of proof is that the same obscene films and "unfair trade practice" is being continued in the same area by SelectTV on Channel 22 under the same subscription argument between Oak's representatives and attorney Clancy's subscription service.

CDL submits that in the event that it prevails on its appeal and that this Court should have allowed the filing of the counterclaim, it should, as a matter

of law, be allowed to amend the counterclaim to add SelectTV as an additional defendant, as the assignee of Oak's interest in the "ON TV Adults Only" "system," in as much as SelectTV acquired the interest while the Counterclaim was being appealed.

III

THE FUNDAMENTAL ISSUE IS NOT WHETHER CDL IS ENTITLED TO INJUNCTIVE RELIEF AGAINST OAK, BUT RATHER WHETHER CDL IS ENTITLED TO DECLARATORY JUDGMENT RELIEF THAT THE FILMS BEING EXHIBITED ON THE "ON-TV ADULTS ONLY" PROGRAMMING SYSTEM, AND THE SUCCESSORS IN INTEREST THERETO (WHOMEVER IT MAY BE) CONSTITUTES AN "UNLAWFUL BUSINESS PRACTICE" OF EXHIBITING OBSCENE MOTION PICTURE FILMS AS A REGULAR COURSE OF BUSINESS.

CDL is a national non-profit, corporation founded for and dedicated to the purpose of stopping the spread of obscene subject matter that is being publicly exhibited throughtout this nation, including the exhibitions of such matter on television. Attorney

James J. Clancy, who represents CDL in this action has specialized in obscenity litigation for the past 20 years. The historical events set forth in the introduction of these points and authorities, demonstrate that the pleadings set forth in the Third Counterclaim (CR 42) filed on October 5, 1984, does not merely allege a cause of action for an injunction against the defendant Oak which has been rendered "moot" by the assignment of their subscription list, programming and film licenses to Select TV.

The "historical events" set forth in the Introduction to these points and authorities demonstrate the horns of the dilemma upon which this nation has been placed as a result of the rulings of the F.C.C. and the U.S. District Court in this matter. The undersigned personally filed a petition with the F.C.C.

challenging the hard-core pornography being transmitted by Oak on "ON-TV Adults Only" on Channel 15 in the Phoenix area and on Channel 52 in the Los Angeles area. The petition as to Channel 15 was acted upon by the F.C.C. and dismissed on the grounds of Clancy's "lack of standing" because he did not reside in Phoenix. The petition as to Channel 52, which was not subject to a "lack of standing" dismissal because Clancy was a subscriber and was a resident of Los Angeles, was never acted upon by the F.C.C. Further, when F.C.C. representative Thomas R. Herwitz was questioned by the Chairman of the U.S. Attorney General's Commission on Pornography on what the F.C.C. required before it would act in matters such as Clancy's petition, he stated (see Exhibit 1 to these points and authorities at pages 364-375) that it

would take a decision by a Court in the Southern California area that a film being exhibited by the Southern California station was obscene. Yet, that was the very question which CDL attempted to place before the U.S. District Court in its "Amended Second Counterclaim for Declaratory Relief" which U.S. District Judge Gordon Thompson dismissed on October, 1984, and which is before the Court of Appeal in the pending appeal.

CDL contends that this Court's order, entered on October 2, 1984, which dismissed CDL's amended second counterclaim for declaratory relief under Zeitlin v. Arnebergh was in error.

At Points III, V, and VI of the points and authorities filed on December 21, 1983, in support of the "First Amended Counterclaim of Defendant Citizens for Decency through Law, Inc.,

for Declaratory Judgment Relief", CDL argued that the counterclaim should be allowed "since without it plaintiff might withdraw the suit and leave the rights of the parties in uncertainty..." (Part III at page 6, lines 10-14); and that "The rule that a counterclaim for declaratory judgment is proper where the dispute under said counterclaim goes beyond the single claim and the particular accusations involved in the main suit was discussed by the U.S. Supreme Court in Altvater v. Freeman, 319 U.S. 359, 876 L.Ed. 1450 (19743) . . . "The counterclaim proposed herein presents independent and entirely separate pendent state causes of action, and in addition goes beyond the single claim and the accusations involved in the main suit which Plaintiff has limited to the legal effect of certain separate statements allegedly made by

counter-defendant. . ." (Point V, page 7, lines 17 et seq., and, "The facts pleaded in the Proposed Counterclaim demonstrates that a controversy regarding the content, character and propriety of "ON-TV Adults Only" programming, in its current format, presently exists between the parties and is of an on-going nature at the time of the filing of this motion. . ." (Part VI, page 9, lines 6-10) (See Copy of Points III, V, and VI attached as Exhibit 2 to these Points and Authorities).

Although that dismissal was not an appealable order, an appeal from that order is presently allowable from the final judgment of dismissal of U.S. District Judge Leland Nielsen on December 12, 1985, pursuant to Plaintiffs motion to dismiss with prejudice under F.R.C.P. 41(a)(2).

F.R.C.P Rule 41(a)(2) provides that the counterclaim shall not be dismissed against the defendant's objections and shall remain pending for independent adjudication by the Court.

Respectfully submitted,

James J. Clancy
Attorney for Defendant
Citizens for Decency
through Law, Inc.

APPENDIX "K"

CDL Petition for Rehearing filed on or about April 29, 1986.

(Reference: Petition at pages 16, 53, and 59.)

....K-1 thru K-8

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

OAK INDUSTRIES, INC., and OAK MEDIA DEVELOPMENT CORPORATION,
Plaintiff-Appellees,

No. 84-6541

D.C. No.
CV 83-1018-GT(I)

-vs-

BRUCE A. TAYLOR,

Defendant,

CITIZENS FOR DECENCY THROUGH LAW, INC.,

Defendant-Appellant.

PETITION FOR REHEARING

PETITION FOR REHEARING

Defendant-Appellant, Citizens for Decency through Law, Inc., respectfully requests this Honorable Court to reconsider its Order of April 15, 1986, and to allow the parties to file a Record on Appeal, Appendix, and Briefs on this issue of Mootness.

This Court's Order of April 15th stated: "Based upon the uncontested findings and order of the district court entered February 24, 1986, on remand from this court, this appeal is dismissed as moot." This unilateral dismissal did not allow the Appellant to submit points and authorities in support of the position that the instant appeal is not moot on the Declaratory Judgment Claim. Defendant-Appellant should be provided the opportunity to show that the District Court was incorrect in determining that the sale and

divestiture of Plaintiff-Oak's television license and programs was valid and that this issue was"uncontested". Defendant-Appellant submits that there were insufficent facts before the District Court to determine the complex legal issue as to the validity of the sale. The burden should be on the party claiming mootness (Oak) to submit evidence that the sale was valid. Defendant (CDL) requested discovery from Oak on this issue during the remand, but was refused. Oak should have provided the District Court the record of proceedings before the F.C.C. and its own corporate records of the sale to allow the Court to make an independant review and to allow Defendant-CDL to state its position on this issue. The District Court erred by saying CDL did not contest the validity

and, in effect, shifting the burden of proof to Defendant.

Defendant-Appellant(CDL) was denied Appellate Due Process by the action of this Court in dismissing the appeal without allowing the parties to address the issue of mootness on legal and factual grounds. Furthermore, this Court was clearly incorrect in stating that the findings and Order of the District Court were "uncontested". Appellant-CDL certainly contested, and does contest here, the findings and Order and desires to brief its reasons thereon. These issues are central to the validity of the appeal and to the relief sought in the court below and the appeal of these issues deserves careful attention after input from the parties and submission of a record. There were many facts in evidence before the District Court which were not made

available or argued to this Court. (See Appendix herein). Exhibit D to this Petition is the remand by the F.C.C. for a fact finding hearing on the obscenity of past programming of a Chicago station up for license renewal. The F.C.C. distinguished the Chicago case (which also involved Oak) from the instant case of license renewal, because the obscenity of Oak's program content was "pending" before the District Court. See: In re: Harriscope of Chicago, Inc., 58 R.R.2d 1537, at 1539, para. 6 (F.C.C. Review Board, 1985) (Appendix D herein). This decision shows that the F.C.C. renewed Oak's license in the instant case based upon the untrue assumption that the District Court below was considering the declaratory claims of Defendant-Appellant CDL. Plaintiff-Oak knew of such representations to the F.C.C. and took renewal with notice and

knowledge of this falsehood. Oak knew the District Court had denied filing CDL's Counterclaim and that the declaratory action was not pending. It is unconsionable to allow the Plaintiff to receive a renewal, and sale approval, from the F.C.C. based upon the litigation of the obscenity issue in the federal court, and then to achieve dismissal of the federal action because the F.C.C. approved the sale. The Plaintiff cannot benefit from a known mis-reliance by the F.C.C. on non-existent circumstances. The F.C.C should have delayed renewal if it was relying, as it said, on the District Court in this case. It should be relevant to the mootness of CDL's declaratory claim that the F.C.C. denied CDL's challenge to Oak's renewal because of this instant action. It may well be proper to consider the joint actions of

the F.C.C. and Oak and allow the counterclaim to proceed (and possibly expanded to include the F.C.C). and consider the "validity of the sale" in light of all the circumstances. Since there was no pending federal forum, the F.C.C. should have ordered the obscenity issue to be heard before an Administrative Law Judge, as in the Chicago case. Oak should not be allowed to rely on a falsehood to get its license renewed and then sell the license to moot the federal action it relied on. If the federal declaratory claim of CDL was relevant to the renewal and sale in the first instance, it must still be relevant to the present issue of the validity of that sale and mootness of this appeal.

In any event, it would seem fair and proper for this Court to order that a record and briefs be submitted to

present the question of mootness in its true relationship to the record below.

There are two issues on original appeal in this case: (1) whether the District Court should consider a declaratory judgment that Oak's programs were obscene under 18 U.S.C. 1464, and (2) whether the Court should enjoin such obscene and illegal conduct. Only the injunction claim should be considered moot by Oak's divestiture. The declaratory claims are still viable and indeed necessary to prevent manifest injustice under the facts of this case.

Respectfully submitted,

_____

Bruce A. Taylor
Attorney for Appellant

APPENDIX "L"

Declaration of Robert J. McGuire, regarding surveillances of ON-TV films executed September 7, 1986.

(Reference: Petition at pages 51, 53, 56, 59, 60, and 64.)

....L-1 thru L-9

DECLARATION OF ROBERT MCGUIRE IN OPPOSITION TO DECLARATIONS OF S. JAMES MILLER AND CLAIM REGARDING MOOTNESS OF RELIEF SOUGHT.

I, Robert McGuire, declare and say:

1. I am the investigator who made the 14-page Declaration in Support of Motion for Preliminary Injunction executed by me on March 24, 1986 in People of the State of California ex rel. Cooper v. Mitchell Brothers' Santa Ana Theater, in the Superior Court of the State of California for the County of Orange, No. 48-49-38, which appears as a part of Exhibit 3 to the "Motion to Allow Amicus Curiae City of Santa Ana To Argue" filed with this Court on or about March 26, 1986 in People of the State of New York ex rel. Arcara In the Supreme Court of the United States, October Term, 1985, No. 85-437.

2. I have personal knowledge of the following facts and am competent to testify as to the truth of these facts if called as a witness.

3. I was requested by James J. Clancy, attorney at law, La Tuna Canyon Road, Sun Valley, California 91352 to perform the surveillance services described hereafter.

4. For the past ten years (since 1976) I have conducted a weekly sound and photographic surveillance of the motion picture films being exhibited at the Mitchell Brothers' Santa Ana Theater in Santa Ana, California and have done so in the manner described in my March 24, 1986 declaration described at paragraph 1 above. During that period I surveilled approximately 104 films each year, for a total of approximately 1040 films in that ten year period.

5. From February of 1981 to the present date, I have also maintained a continuous surveillance of the television transmissions of "ON-TV Adults Only" program service, and its successor in interest "On-TV SelecTV" and "SelecTV of California" and have recorded the same on video-cassette tapes. The films which I have surveilled and recorded during

that 5-½ year period are listed by title at Appendix M to this Petition for Writ of Certiorari herein.

6. I obtained the original subscription for my television surveillance from ON-TV in 1981. Since that time, I have received uninterrupted service of the Pay TV Adults Only Programs under my original subscription with ON-TV. There have been no assignments or amendments to that subscription. The only change has been in the manner of billing. On or after July 27, 1985, I received a monthly billing from ON-SelecTV and on or after January 1, 1986, I received a monthly billing from SelecTV of California.

The content and character of the films which have been surveilled by me for the period from 1981 to the present date under my original subscription with ON-TV, as described at Appendix "M" has been the same.

7. In the Santa Ana litigation, during the period from May, 1985 to the present I have made comparison

studies between time and motion studies (one picture taken every 3 seconds) of 150 of the films recently exhibited at the Mitchell Brothers' Theater and identical time and motion studies (one picture taken every 3 seconds) of video cassette tapes with the same title, purchased upon the commercial market. A comparison of the two time and motion studies establishes that the video cassette tapes sold on the commercial market are the identical films exhibited at the Mitchell Brothers' Santa Ana Theater, which uses a 35mm positive print for projection at the theater.

8. I have made similar comparison studies of the time and motion studies (one picture taken every 3 seconds) of the films televised by ON-TV and identical time and motion studies (one picture taken every 3 seconds) of video cassette tapes with the same title, purchased upon the commercial market. A comparison of the two time and motion studies of the same film title establishes

the video cassette tapes sold on the commercial market are the identical films exhibited on the ON-TV, ON-SelecTV and SelecTV except for the following:

(1) certain explicit sexual scenes appearing in the commercial video tape version have been excised and do not appear in the televised version; and

(2) in certain of the explicit sexual scenes appearing on the commercial video tape version, the camera is focused directly upon the sexual organs which are engaged in the sexual act whereas, in most of the scenes in the televised version, the camera focus is directed away from the sexual organs and on to other parts of the bodies of the persons involved in the same sexual act.

The timed segments set forth below describe identical segments which I compared and which provided the basis for the above described analysis for the televised versions of "All American Girls" and "California Valley Girls" lodged with this Court.

CALIFORNIA VALLEY GIRLS

	DATE	RUNNING TIME
SELECTV	12 03/85	01:04:40
COMMERCIAL VIDEO TAPE		01:30:15
TIME DIFFERENTIAL		00:25:35

COMPARISON

SELECTV	COMMERCIAL VIDEO TAPE
00:00:19	00:05:05
00:01:54	00:07:00
00:05:50	00:11:18
00:08:59	00:15:13
00:28:16	00:29:59
00:31:37	00:40:30
00:38:51	00:47:38
00:42:56	00:53:25
00:48:29	00:58:56
00:51:24	01:04:37
00:55:33	01:08:58
00:57:26	01:13:58
01:00:47	01:17:20
01:03:24	01:28:39

ALL AMERICAN GIRLS

ON-	DATE	RUNNING TIME
SELECTV	05/02/85	01:13:41
COMMERCIAL VIDEO TAPE		01:29:46
TIME DIFFERENTIAL		00:16:05

COMPARISON

SELECTV	COMMERCIAL VIDEO TAPE
00:04:03	00:04:15
00:07:22	00:10:28
00:18:57	00:22:29
00:21:03	00;25:45
00:34:19	00:39:06
00:37:26	00:43:45
00:46:44	00:53:20
00:48:06	00:55:26
00:55:01	01:02:31
00:57:42	01:06:32
01:02:46	01:11:57
01:05:27	01:15:25
01:08:40	01:18:36
01:12:25	01:23:44

ALL AMERICAN GIRLS

	DATE	RUNNING TIME
SELECTV	04/12/86	01:13:19
COMMERCIAL VIDEO TAPE		01:30:15
TIME DIFFERENTIAL		00:17:04

COMPARISON

SELECTV	COMMERCIAL VIDEO TAPE
00:02:23	00:02:27
00:03:04	00:03:22
00:03:36	00:04:48
00:07:29	00:11:03
00:18:10	00:21:51
00:20:50	00:25:45
00:33:04	00:38:51
00:36:52	00:43:45
00:42:35	00:50:15
00:47:12	00:55:26
00:53:54	01:02:13
00:57:06	01:06:32
01:01:55	01:11:22
01:04:55	01:15:25
01:08:19	01:18:48
01:12:18	01:23:44

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 7, 1986 at Sun Valley, California 91352.

Robert McGuire.

BEST AVAILABLE COPY

APPENDIX "M"

List of films broadcast by ON-TV and recorded by Robert McGuire.

(Reference: Petition at page 57 and 60.)

....M-1 thru M-17

1981

DATE	NAME OF FEATURE
02/14/81	KINKY LADIES OF BURBON STREET
02/22/81	MISBEHAVIN'
03/08/81	LEGEND OF LADY BLUE
04/11/81	MANNEQUIN
04/14/81	EXPOSE ME LOVELY
04/19/81	VANESSA
04/25/81	PEOPLE
05/02/81	TEMPTATIONS
05/09/81	THE EROTIC ADVENTURES OF ZORRO
05/16/81	THROUGH THE LOOKING GLASS
05/23/81	TEMPTATIONS
05/30/81	MARASCHINO CHERRY
06/06/81	BON APPETIT
06/10/81	JACK 'N' JILL
06/14/81	THE SENSUOUS FRENCH WOMEN
06/23/81	DONA FLOR AND HER TWO HUSBANDS
06/27/81	LOVE PLAY
07/05/81	MISBEHAVIN'
07/08/81	PUSSY TALK
07/11/81	OPENING OF MISTY BEETHOVEN
07/15/81	EXPOSED
07/22/81	GARDEN OF BEAUTY
08/02/81	NAKED CAME THE STRANGER
08/04/81	BEL AMI
08/09/81	KINKY LADIES OF BURBON STREET
08/16/81	FRAT HOUSE
08/19/81	BARBARA BROADCAST
08/26/81	FRAT HOUSE
08/29/81	BARBARA BROADCAST
09/01/81	THE ECSTACY GIRLS
09/06/81	PLATO'S: THE MOVIE
09/12/81	A WOMAN IN THE NIGHT
09/27/81	SOMETIME SWEET SUSAN
10/03/81	HOT LEGS
10/10/81	BILITIS
10/18/81	EXPOSE ME LOVELY
10/24/81	COED FEVER
12/06/81	EMMANUELLE II: THE JOYS OF A WOMAN

DATE	NAME OF FEATURE
12/08/81	PLEASURE PALACE
12/12/81	SEX BOAT
12/16/81	MYSTIQUE

1982

DATE	NAME OF FEATURE
01/02/82	THE VIOLATION OF CLAUDIA
01/09/82	JACK 'N' JILL
01/16/82	LIPPS & MC CAIN
01/31/82	EXPOSED
02/02/82	FASCINATION
02/06/82	HOT LEGS
02/09/82	PANORAMA BLUE
02/14/82	THE LEGEND OF LADY BLUE
03/02/82	CHATTERBOX
03/07/82	GOODBYE EMMANUELLE
03/09/82	MORE THAN SISTERS
03/13/82	SEX WITH STARS
04/04/82	MARASCHINO CHERRY
04/07/82	THROUGH THE LOOKING GLASS
04/10/82	THE WORLD OF HENRY PARIS
04/14/82	SWEET AND LOW
05/01/82	STORY OF O
05/04/82	ROBIN'S NEST
05/08/82	SUNNY
05/15/82	LOVE PLAY
05/16/82	THE PUNISHMENT OF ANNE
06/01/82	CHEATING COUPLES
06/06/82	OPENING OF MISTY BEETHOVEN
06/09/82	EROTIC DELIGHTS
06/13/82	FRENCH VIBRATION
06/15/82	EXPOSED
06/23/82	NAKED CAME THE STRANGER
07/02/82	AMANDA BY NIGHT
07/03/82	FELICIA
07/03/82	HOT GAMES OF LOVE
07/04/82	SIZZLE
07/10/82	WILD PLEASURE
07/10/82	PASSION OF PLEASURE

DATE	NAME OF FEATURE
07/10/82	EMILY
07/11/82	SCORE
07/17/82	7 INTO SNOWY
07/18/82	BILITIS
08/17/82	LAST TANGO IN PARIS
08/07/82	EXPECTATIONS
08/08/82	FAST CARS, FAST WOMEN
08/08/82	CHARLI
08/13/82	CHORUS CALL
08/13/82	THE VIOLATION OF CLAUDIA
08/15/82	PORTRAIT OF SEDUCTION
08/15/82	A WOMAN IN THE NIGHT
09/03/82	EASY
09/03/82	A SCENT OF HEATHER
09/05/82	SEX WORLD
09/05/82	VISTA VALLEY P.T.A.
09/11/82	GARAGE GIRLS
09/11/82	TALK DIRTY TO ME
09/11/82	ULTRA FLESH
09/18/82	PANORAMA BLUE
10/01/82	THE LADY IS A TRAMP
10/02/82	CAR HOPS
10/03/82	PINK CHAMPAGNE
10/05/82	ANNA OBSESSED
10/06/82	EVERY WAY SHE CAN
10/06/82	BORDELLO
10/07/82	AMERICAN PIE
10/09/82	MEMORIES WITHIN MISS AGGIE
10/09/82	H.O.T.S.
10/10/82	NAKED AFTERNOON
10/11/82	SEX WISH
10/14/82	TINSEL TOWN
10/16/82	RUN RABBIT RUN
10/17/82	THE JOY OF FOOLING AROUND
10/23/82	THE "10" GIRLS
10/27/82	THE BUDDING OF BRIE
11/02/82	OLYMPIC FEVER
11/02/82	MY MOTHER, MY LOVER
11/03/82	THE TALE OF TIFFANY LUST
11/03/82	EMMANUELLE AROUND THE WORLD
11/04/82	YOUNG PLAYTHINGS

DATE	NAME OF FEATURE
11/05/82	BLUE MAGIC
11/07/82	DRACULA EXOTICA
11/07/82	THE FANTASIES OF A SENSUOUS WOMAN
11/09/82	LADIES NIGHT
11/09/82	TEENAGE TRAMP
11/10/82	PUSSYCAT RANCH
11/12/82	PENELOPE
11/16/82	THE NEW ADVENTURES OF SNOW WHITE
11/20/82	HIGH SCHOOL MEMORIES
11/23/82	THE BAWDY BED
11/28/82	SEX SURROGATE
12/01/82	PLEASE, MR. POSTMAN
12/02/82	THE JOY OF LETTING GO
12/04/82	NEW YORK BABES
12/04/82	NAUGHTY SCHOOL GIRLS
12/04/82	3 A.M.
12/06/82	ARDENT LOVERS
12/07/82	TEENAGE HITCHHIKERS
12/08/82	INDECENT EXPOSURE
12/09/82	PANDORA'S MIRROR
12/10/82	"F"
12/10/82	HOT RACKETS
12/12/82	FIVE KITTENS
12/13/82	CONFESSION OF A YOUNG AMERICAN HOUSEWIFE
12/14/82	CINDY AND DONNA
12/15/82	TOTAL RAPTURE
12/18/82	INSERTS

1983

DATE	NAME OF FEATURE
01/01/83	EVERYTHING GOES WILD
01/01/83	SUPERCHICK
01/03/83	THE OTHER SIDE OF JULIE
01/05/83	SWINGING SKI BUNNIES
01/06/83	BALL GAME
01/08/83	FANTASY IN BLUE

DATE	NAME OF FEATURE
01/09/83	WEEKEND WITH THE BABYSITTER
01/10/83	FIONA ON FIRE
01/12/83	THE SENSUOUS NURSE
01/14/83	PASSIONATE PLEASURES
01/15/83	FRENCH VIBRATIONS
01/16/83	THE SENATOR LIKES WOMEN
01/19/83	DEVIL'S ECSTACY
01/21/83	GAMES WOMEN PLAY
01/22/83	NAKED INFERNO
01/23/83	BLUE MONEY
02/02/83	COUNTRY COMFORT
02/02/83	SWEET SAVAGE
02/03/83	A GIRL'S BEST FRIEND
02/04/83	GETTING OFF
02/06/83	REFLECTIONS
02/07/83	SWINGING SORORITY
02/08/83	SENSUAL ENCOUNTERS
02/09/83	UNDERCOVERS
02/10/83	SENSATIONS
02/11/83	BAD PENNY
02/12/83	GOODBYE EMMANUELLE
02/15/83	THE PUNISHMENT OF ANNE
03/02/83	HOT LEGS
03/03/83	HEAVENLY DESIRE
03/04/83	DEVIL'S GARDEN
03/05/83	MASH'D
03/07/83	A DIRTY WESTERN
03/08/83	RHINESTONE COWGIRLS
03/09/83	V - THE HOT ONE
03/10/83	GARAGE GIRLS
03/11/83	BLONDE IN BLACK SILK
03/14/83	SUNNY
03/19/83	BUTTERFLIES
03/21/83	SATIN SUITE
04/03/83	THE FIRST TIME
04/04/83	ANY TIME, ANY PLACE
04/06/83	SEX WORLD
04/06/83	FELICIA
04/07/83	SATIN SUITE
04/08/83	FILTHY RICH

DATE	NAME OF FEATURE
04/11/83	URBAN COWGIRLS
04/16/83	COUNTRY COMFORT
04/16/83	EROTICA
04/20/83	BUTTERFLIES
04/23/83	EMMANUELLE, THE JOYS OF A WOMAN
04/25/83	NEVER SO DEEP
05/02/83	EASY
05/04/83	THE HONEYMOON IS OVER
05/05/83	LITTLE ORPHAN DUSTY
05/06/83	STARSHIP EROS
05/09/83	BLONDE VELVET
05/10/83	THE UNTAMED
05/11/83	TWILITE PINK
05/13/83	SMALL TOWN GIRLS
05/20/83	THAT LUCKY STIFF
05/23/83	ILLUSIONS WITHIN GIRLS
06/01/83	THE TALE OF TIFFANY LUST
06/02/83	EXPECTATIONS
06/03/83	INSATIABLE
06/04/83	SADDLE TRAMP WOMEN
06/06/83	SHAHERAZADE, A THOUSAND & ONE EROTIC NIGHTS
06/07/83	HOT DALLAS NIGHTS
06/09/83	LITTLE GIRLS BLUE
06/09/83	V - THE HOT ONE
06/11/83	THE JOY OF FOOLING AROUND
06/18/83	FRUITS OF PASSION
06/29/83	VANESSA
07/02/83	HOT TIMES
07/03/83	NURSES OF THE 407
07/05/83	THE SPIRIT OF SEVENTY SEX
07/06/83	ABIGAIL LESLIE IS BACK IN TOWN
07/07/83	A GIRL'S BEST FRIEND
07/08/83	WILD PLEASURES
07/09/83	PINK CHAMPAGNE
07/10/83	LITTLE ORPHAN DUSTY II
07/12/83	EVERY WHICH WAY SHE CAN
07/16/83	EMMANUELLE AROUND THE WORLD
07/17/83	THE EROTIC ADVENTURES OF ZORRO
07/21/83	LAURA'S TOYS

DATE	NAME OF FEATURE
08/13/83	BLUE SUMMER
08/14/83	BAD PENNY
08/19/83	HOT LINE
09/02/83	TEMPTATIONS
09/03/83	THE SEVEN SEDUCTIONS OF MADAME LAU
09/04/83	EXTREME CLOSE-UP
09/09/83	THE SATISFIERS OF ALPHA BLUE
09/10/83	GISELLE
09/24/83	GROWING UP
10/02/83	FRENCH BUMPERS
10/07/83	WANDA WHIPS WALL STREET
10/08/83	OUTLAW LADIES
10/14/83	BEACH BLANKET BANGO
10/15/83	SKIN ON SKIN
10/21/83	LITTLE BLUE BOX
11/05/83	HIGH SCHOOL FANTASIES
11/06/83	BODY LOVE
11/11/83	BLONDE FIRE
11/12/83	CALIGULA AND MESSALINA
11/18/83	MELODY IN LOVE
11/19/83	ERUPTION
12/02/83	AFTERNOON DELIGHTS
12/02/83	DEVIL'S ECSTACY
12/03/83	HELATH SPA
12/03/83	INDECENT EXPOSURE
12/04/83	LOVE YOU
12/04/83	HARD SOAP - HARD SOAP
12/08/83	UNDERCOVERS
12/09/83	AUNT PEG'S FULFILLMENT
12/10/83	THE FILTHY RICH
12/11/83	TABOO
12/18/83	BLUE SUMMER

1984

DATE	NAME OF FEATURE
01/05/84	SOCIETY AFFAIRS
01/06/84	THE FIRST TIME

DATE	NAME OF FEATURE
01/06/84	CAFE' FLESH
01/07/84	SENSATIONS
01/07/84	SUMMER OF '72
01/08/84	BLONDE IN BLACK SILK
01/08/84	SATISFACTIONS
01/13/84	BRIEF AFFAIR
01/13/84	HEAVENLY DESIRE
01/14/84	A GIRL'S BEST FRIEND
01/14/84	CENTERSPREAD GIRLS
01/15/84	COUNTY COMFORT
02/02/84	RING OF DESIRE
02/03/84	LAURA'S TOYS
02/03/84	INSATIABLE
02/04/84	TELL THEM JOHNNY WADD IS HERE
02/04/84	PINK LADIES
02/05/84	ANYTIME, ANYPLACE
02/05/84	TAKE OFF
02/09/84	ROOMMATES
02/10/84	COME PLAY WITH ME
02/11/84	AMERICAN DESIRE
02/12/84	URBAN COWGIRLS
02/12/84	SKINTIGHT
03/01/84	LAURA'S DESIRE
03/02/84	FRAT HOUSE
03/02/84	C.T.
03/03/84	BLUE MAGIC
03/03/84	NAUGHTY VICTORIANS
03/04/84	THE UNTAMED
03/04/84	ANYTIME, ANYPLACE
03/09/84	STARSHIP EROS
03/10/84	NEVER SO DEEP
03/10/84	ROOMMATES
03/11/84	NURSES OF THE 407
03/16/84	PUSS 'N BOOTS
03/17/84	PINK LADIES
03/17/84	TITILLATION
03/25/84	FRENCH BUMPERS
04/05/84	C.T.
04/06/84	WET RAINBOW
04/06/84	TITILLATION
04/07/84	NATHALIE

DATE	NAME OF FEATURE
04/07/84	BEAUTY
04/08/84	JOY
04/08/84	LOVE, LUST AND ECSTACY
04/12/84	LAURA'S DESIRE
04/14/84	COED FEVER
04/14/84	FRAT HOUSE
04/15/84	BON APPETIT
04/15/84	BLONDE AMBITION
04/15/84	BEST OF SEX & VIOLENCE
04/24/84	NANA (SPECIAL TAPING)
04/25/84	INSATIABLE II
04/25/84	INSATIABLE I
04/29/84	HOT DALLAS NIGHTS
05/03/84	DO YOU WANNA BE LOVED
05/04/84	RING OF DESIRE
05/04/84	MIDNIGHT HEAT
05/04/84	BEAUTY
05/05/84	BABE
05/06/84	SKINTIGHT
05/06/84	BEL AMI
05/10/84	VISTA VALLEY, PTA
05/11/84	NATHALIE
05/12/84	GARAGE GIRLS
05/17/84	SHOPPE OF TEMPTATIONS
05/17/84	ISLAND WOMEN
05/19/84	THE MISTRESS
05/20/84	HOT RACKETS
05/20/84	EXPOSE ME LOVELY
05/25/84	WET RAINBOW
05/28/84	MARASCHINO CHERRY
06/01/84	LITTLE GIRLS LOST
06/02/84	PUSS 'N BOOTS
06/02/84	SAN FERNANDO VALLEY GIRLS
06/03/84	AFTERNOON DELIGHTS
06/03/84	HIGH SCHOOL FANTASIES
06/08/84	SHOPPE OF TEMPTATIONS
06/08/84	SIX SWEDES AT A PUMP
06/09/84	ISLAND WOMEN
06/09/84	MEMPHIS CATHOUSE BLUES
06/10/84	WANDA WHIPS WALL STREET

DATE	NAME OF FEATURE
06/10/84	MISBEHAVIN'
06/15/84	MOLLY
06/16/84	NAUGHTY VICTORIANS
06/16/84	BLONDE GODDESS
06/17/84	THE SPIRIT OF SEVENTY SEX
06/17/84	MRS. BARRINGTON
07/03/84	SERENA, AN ADULT FAIRY TALE
07/04/84	BLONDE GODDESS
07/05/84	N.Y. BABES
07/06/84	SIX SWEDES AT A PUMP
07/07/84	SWEET CHEEKS
07/07/84	OLYMPIC FEVER
07/08/84	molly
07/08/84	PINK LADIES
07/13/84	ERUPTION
07/14/84	HARD SOAP, HARD SOAP
07/14/84	NOTHING TO HIDE
07/15/84	OPENING OF MIST BEETHOVEN
07/19/84	LOVE, LUST & ECSTACY
07/20/84	BANGKOCK CONNECTION
07/28/84	FELICITY
08/02/84	BRIEF AFFAIR
08/03/84	BANGKOCK CONNECTION
08/03/84	BROOKE GOES COLLEGE
08/04/84	BLUE MAGIC
08/04/84	MAN EATER
08/05/84	LADYS NIGHT
08/05/84	NOTHING TO HIDE
08/05/84	KINKY LADIES OF BOURBON STREET
08/06/84	ROOMMATES
08/10/84	C.T.
08/11/84	SUMMER OF '72
08/11/84	FELICITY
08/11/84	BODY MAGIC
08/17/84	MARY, MARY
08/18/84	SIX SWEDES ON A CAMPUS
08/18/84	A TASTE OF MONEY
08/29/84	THE DEVIL IN MISS JONES
08/29/84	THE DEVIL IN MISS JONES, PART II
08/31/84	BLONDE FIRE

DATE	NAME OF FEATURE
09/01/84	WICKED SENSATIONS
09/02/84	SOCIETY AFFAIRS
09/02/84	SIX SWEDES ON A CAMPUS
09/02/84	LAURA'S DESIRES
09/03/84	CENTERSPREAD GIRLS
09/04/84	SIX SWEDES ON A CAMPUS
09/07/84	MARY, MARY
09/07/84	DEBBIE DOES DALLAS
09/08/84	TABOO
09/08/84	BAD GIRLS
09/09/84	A TASTE OF MONEY
09/14/84	TRUCK STOP
09/16/84	FRAT HOUSE
09/21/84	PIGGYS
09/22/84	THE PLAYGIRL
09/30/84	NATHALIE
10/04/84	THE PLAYGIRL
10/05/84	BODY LOVE
10/05/84	PIGGYS
10/05/84	DEBBIE DOES DALLAS II
10/06/84	DELICIOUS
10/07/84	THE MISTRESS
10/07/84	TRUCK STOP
10/12/84	THE SECOND COMING OF EVA
10/12/84	HEALTH SPA
10/13/84	WET RAINBOW
10/14/84	CALIGULA & MESSALINA
10/14/84	SISTERS
10/19/84	GRAND ECSTACY
10/20/84	BAD GIRLS II
10/21/84	BLACK EMMANUELLE
11/01/84	AMERICAN DESIRE
11/02/84	AUNT PEG'S FULFILLMENT
11/02/84	LUSCIOUS
11/03/84	LOVE YOU
11/03/84	HOT PURSUIT
11/04/84	EMMANUELLE AND JOANNA
11/10/84	EXPOSE
11/11/84	SATISFACTION
11/15/84	SMOKER

DATE	NAME OF FEATURE
11/16/84	BAD GIRLS II
11/18/84	BABE
11/25/84	ERUPTION
11/30/84	SISTERS
11/30/84	GRAND ECSTASY
12/01/84	HEALTH SPA
12/01/84	JACK 'N JILL
12/02/84	EXPENSIVE TASTE
12/06/84	THE DIRTY MIND OF YOUNG SALLY
12/07/84	GETTING OFF
12/07/84	GIRLS AFTER MIDNIGHT
12/08/84	FANTASY IN BLUE
12/12/84	MARILYN CHAMBERS' PRIVATE FANTASIES
12/14/84	CAFE FLESH
12/14/84	TAXICAB FOR LADIES
12/15/84	MEMPHIS CATHOUSE BLUE
12/16/84	SOCIETY AFFAIRS
12/21/84	BALL GAME
12/21/84	FASCINATION
12/29/84	REFLECTIONS

1985

DATE	NAME OF FEATURE
01/04/85	COUNT THE WAYS
01/04/85	NOTHING TO HIDE
01/04/85	LOVE TRAP
01/05/85	MARY, MARY
01/05/85	FOREPLAY
01/06/85	EVERYTHING GOES WILD
01/11/85	LESSON IN LOVE
01/11/85	LINDA
01/11/85	MELODY IN LOVE
01/12/85	DIRTY LILLY
01/25/85	JACK 'N JILL
01/26/85	THE DIRTY MIND OF YOUNG SALLY
02/01/85	LET'S TALK SEX
02/02/85	UNDERCOVERS
02/03/85	SORORITY SWEETHEARTS

DATE	NAME OF FEATURE
02/03/85	TOTAL RAPTURE
02/07/85	NASTY NURSES
02/08/85	SUMMER OF '72
02/08/85	PRIVATE TEACHER
02/09/85	TABOO
02/09/85	HOT DREAMS
02/10/85	BRIEF AFFAIR
02/15/85	HEAVEN'S TOUCH
02/22/85	HEALTH SPA
03/01/85	SEX GAMES
03/02/85	THE PLAYGIRL
03/02/85	SUMMER CAMP GIRLS
03/07/85	WHITE HEAT
03/08/85	NAKED INFERNO
03/08/85	BURNING SNOW
03/09/85	ARDENT LOVERS
03/09/85	LADY LUST
03/10/85	FRAT HOUSE
03/15/85	I LIKE TO WATCH
03/16/85	SATISFACTION
03/29/85	AMERICAN DESIRE
04/04/85	HER WICKED WAYS
04/05/85	COUNT THE WAYS
04/05/85	SEX STARS
04/06/85	WORKING IT OUT
04/06/85	BODACIOUS TA TA'S
04/07/85	AMANDA BY NIGHT
04/11/85	PUBLIC AFFAIRS
04/12/85	SWEET SAVAGE
04/12/85	PANDORA'S MIRROR
04/13/85	ILLUSIONS
04/19/85	SOCIETY AFFAIRS
04/26/85	BALL GAME
04/29/85	APHRODITE
04/30/85	WORKING IT OUT
05/01/85	ILLUSIONS
05/02/85	ALL AMERICAN GIRLS
05/03/85	MELODY IN LOVE
05/03/85	THE BLONDE NEXT DOOR
05/04/85	CENTERSPREAD GIRLS
05/04/85	HOT BODIES

DATE	NAME OF FEATURE
05/05/85	SEX WAVES
05/06/85	EVERYTHING GOES WILD
05/10/85	SOCIETY AFFAIRS
05/10/85	NIGHT LIFE
05/11/85	INDECENT PLEASURES
06/07/85	STIFF COMPETITION
06/10/85	AMERICAN DESIRE
06/11/85	UNDERCOVERS
06/12/85	SATISFACTIONS
06/13/85	HOT LUNCH
06/14/85	BALL GAME
06/14/85	CANDY GOES TO HOLLYWOOD
06/15/85	COUNT THE WAYS
06/15/85	CHINA GIRL
06/20/85	TANGERINE
06/21/85	FRINGE BENEFITS
06/22/85	TAPESTRY OF PASSION
07/01/85	ARDENT LOVERS
07/02/85	TOTAL RAPTURE
07/03/85	NAKED INFERNO
07/22/85	I LIKE TO WATCH
07/23/85	LADY LUST
07/24/85	EVERYTHING GOES WILD
07/25/85	WILD DALLAS HONEY
07/26/85	TOTAL RAPTURE
07/27/85	THE DANCERS
07/27/85	BETWEEN THE SHEETS
07/29/85	FLASH
07/30/85	LAURA'S TOYS
07/31/85	LAURA'S DESIRES
08/01/85	BUTTERFLIES
08/02/85	L'AMOUR
08/06/85	MISBEHAVIN'
08/09/85	BETWEEN LOVERS
08/12/85	EVERY INCH A LADY
08/15/85	DESIRES WITHIN YOUNG GIRLS
08/21/85	APHRODISIA'S DIARY
09/02/85	RING OF DESIRE
09/03/85	THE PLAYGIRL
09/04/85	COME PLAY WITH ME

DATE	NAME OF FEATURE
09/05/85	ALL AMERICAN GIRLS IN HEAT
09/07/85	BODIES IN HEAT
09/08/85	KINKY BUSINESS
09/10/85	BOARDING SCHOOL
09/11/85	TEMPTING ROOMMATES
09/12/85	TALK DIRTY TO ME, PART III
09/14/85	JACK 'N JILL, PART II
09/15/85	HOT PURSUIT
09/18/85	KINKY LADIES OF BOURBON STREET
10/14/85	I LIKE THE GIRLS WHO DO
10/15/85	HONEY
10/16/85	SWEET ALICE
10/17/85	THE PINK LADIES
10/18/85	GLITTER
10/20/85	COMING TOGETHER
10/21/85	HER WICKED WAYS
10/23/85	EROTIC ADVENTURES OF CANDY
10/24/85	LETTERS OF LOVE
10/26/85	AN UNNATURAL ACT
10/27/85	SLIP INTO SILK
10/28/85	APHRODITTIE
11/07/85	WORKING IT OUT
11/25/85	LUSCIOUS
11/26/85	NATHALIE
11/27/85	SAN FERNANDO VALLEY GIRLS
11/28/85	COFFEE, TEA OR ME
11/30/85	DIXIE RAY, HOLLYWOOD STAR
12/01/85	INSPIRATIONS
12/02/85	THE PUSSYCAT SYNDROME
12/03/85	CALIFORNIA VALLEY GIRLS
12/05/85	MAKING IT BIG
12/08/85	MIDNIGHT HEAT
12/09/85	INDECENT PLEASURES
12/11/85	TALK DIRTY TO ME, PART II
12/12/85	PRIVATE MOMENTS

1986

DATE	NAME OF FEATURE
01/06/86	COUNTRY COMFORT

DATE	NAME OF FEATURE
01/07/86	NIGHT DREAMS
01/08/86	LIPPS & MCCAIN
01/09/86	ALL THE WAY IN
01/10/86	MOMENTS OF LOVE
01/11/86	SHEHERAZADE, A THOUSAND AND ONE NIGHTS
01/13/86	BLONDES HAVE MORE FUN
01/17/86	EXPOSED
01/18/86	CHAMPAGNE FOR BREAKFAST
01/24/86	THE ADVENTURES OF RICK QUICK, PRIVATE DICK
01/28/86	ONE WAY AT A TIME
02/06/86	DOING IT
02/17/86	INTRUDERS
02/18/86	HOT BODIES
02/20/86	OUR LADY OF LUST
02/21/86	GETTING LUCKY
02/21/86	RAW TALENT
02/22/86	EVERY WOMAN HAS A FANTASY
02/24/86	NIGHT LIFE
02/27/86	UP, UP AND AWAY
02/28/86	I WANT TO BE BAD
03/04/86	CONFESSIONS OF A YOUNG AMERICAN HOUSEWIFE
03/05/86	NAUGHTY GIRLS NEED LOVE TOO
03/19/86	BORDELLO
03/31/86	HANDFUL OF DIAMONDS
04/01/86	THE BLONDE NEXT DOOR
04/02/86	ILLUSIONS
04/03/86	FOXTROT
04/04/86	SCOUNDRELS
04/12/86	ALL AMERICAN GIRLS
04/15/86	PLATINUM DANADISE
04/18/86	FAREWELL SCARLET
05/01/86	CHINA GIRL
05/02/86	NEVER SLEEP ALONE
05/04/86	BLUE ECSTACY
05/05/86	CANDY GOES TO HOLLYWOOD
05/06/86	FRINGE BENEFITS
05/09/86	WHEN SHE WAS BAD
05/11/86	VIRGIN AND THE LOVER

DATE	NAME OF FEATURE
05/17/86	SEX WAVES
06/02/86	FLASH
06/03/86	TANGERINE
06/04/86	HOT LUNCH
06/05/86	TAPESTRY OF PASSION
06/07/86	WOMEN IN LOVE
06/12/86	LUSTFUL FEELINGS
06/13/86	BEVERLY HILLS EXPOSED
06/14/86	FOR SERVICES RENDERED
07/01/86	THE DANCERS
07/03/86	BODIES IN HEAT
07/03/86	KINKY BUSINESS
07/05/86	SILK SATIN SEX
07/05/86	SHOW YOUR LOVE
07/11/86	HOT PURSUIT
07/12/86	PRISONER OF PARADISE
07/18/86	SEX-A-VISION
07/19/86	L'AMOUR
07/25/86	BETWEEN LOVERS
08/01/86	YOUNG GIRLS DO
08/01/86	WILD DALLAS HONEY
08/02/86	LET'S GET PHYSICAL
08/08/86	BETWEEN THE SHEETS
08/12/86	BODY GIRLS
08/16/86	WOMEN AT PLAY
09/01/86	AN UNNATURAL ACT
09/02/86	LETTERS OF LOVE
09/04/86	JACK 'N JILL, PART II
09/05/86	MATINEE IDOL
09/06/86	RISING STAR

APPENDIX "N"

Letter of James J. Clancy dated October 30, 1985 to James C. McKinney, Chief, Mass Media Bureau, Federal Communications Commission, regarding application of Oak for renewal of license.

(Reference: Petition at pages 51 and 54.)

....N-1 thru N-6

JAMES J. CLANCY
ATTORNEY AT LAW
9055 La Tuna Canyon Road
Sun Valley, Calif.

AREA CODE (818)
352-2069

October 30, 1985

Mr. James C. McKinney
Chief, Mass Media Bureau
Federal Communications Commission
1919 M Street, N.W., Room 314
Washington, D.C. 20554

Re: Application of Oak Broadcasting Systems, Inc., MBSC(TV), Corona, California, For Renewal of License. File No. BRCT 030727 KH.

Dear Sir;

October 31, 1983, I filed a "Petition For Denial of Renewal of License of Station KBSC-TV, Channel 51, Glendale, California" in the above entitled cause. Thereafter, on January 21, 1984, I transmitted a "Reply to Opposition to Petition to Deny" to the Chief, Mass Media Bureau of the F.C.C., with my supporting affidavit setting forth additional facts, all of

which documented the continuous nature of Channel 52's broadcast of obscene motion picture films from January of 1982 through November of 1983. To this date, I have received no communication whatsoever from the F.C.C. regarding my petition for a denial of the renewal of the license of Station KBSC-TV, Channel 52.

In the period subsequent to my filing of the above described petition, I have, at considerable expenditure of time and moneys, continued to monitor the "ON-TV" transmissions of Oak Industries, Inc. over Channel 52. The exhibits constructed from those surveillances graphically establish that the Oak Industries, Inc.'s broadcasts on their "ON-TV" service became even more pornographic after the filing of my petition to deny the renewal of Channel 52's license. I have brought these autoptical exhibits (evidence) to the attention of two governmental agencies: one at a public hearing on July 31, 1985, before a Senate Judicial Subcommittee on

the enforcement of the federal obscenity laws, and the other at a public hearing on October 16, 1985, to the Attorney General's Commission on Pornography. A copy of my written statements on those two occasions is enclosed.

In a recent phone conversation (October 29, 1985) with one of the attorneys who represents Oak Industries, Inc. and "ON-TV" in a federal lawsuit in San Diego, California, I was informed by him that the F.C.C. has renewed the Channel 52 license and that the station has been sold by Oak Industries, Inc. to another party for 33 million dollars, and that the new owner is to begin broadcasting in Spanish on November 1, 1985. He also stated that he believed that there had been a hearing on my petition, and that it had been denied. As I stated above, I have received no communication whatsoever from the F.C.C. regarding my "Petition to Deny" and have had no notice whatsoever of what action

the F.C.C. has taken in relation to T.V. exhibitions which are a clear violation of Federal law.

Would you please advise me by return mail what, if anything, the F.C.C. has done in addressing the claims which were presented in my "Petition to Deny". I need this information to determine what other remedies I must pursue in seeking a "due process" redress of ON-TV's gross violations of Federal law described in my statements referred to above.

In the enclosed written statements to the Senate Judiciary Subcommittee and the Attorney=General's Commission on Pornography, I have made known my personal conviction, based upon over 20 years of experience in obscenity litigation, that if the facts are as I understand them to be, the F.C.C. and its officers have pursued and are pursuing an administrative practice which has aided and abetted constructive fraud. In my view of the law, the

F.C.C. cannot "close it's eyes" to the gross misconduct in this case and permit the above sale and transfer of the Channel 52 broadcasting license to come about without any sanctions against the malfeasant station owner. The subject matter is so gross the F.C.C. is precluded from claiming that they do not know what the law is and what their duty is in such circumstances.

I was present at the F.C.C.'s presentation to the Attorney General's Commission, which followed my presentation on October 16, 1985, at which time the speaker explained the F.C.C.'s policy in such matters. His statements amazed me. If those policy statements were accurate, they describe a public policy of non-action which, in my judgment, is clearly subject to judicial redress under Bivens v. Six Unknown Named Agents of F.B.I., 403 U.S. 388, 29 L.Ed.2d 619, 91 S.Ct. 1999 (1971).

Sincerely,

James J. Clancy

JJC/cjc
encls.

cc: Attorney General Edwin Meese

Sen. Jeremiah Denton
(Senate Subcommittee on Pornography)

Mr. Henry E. Hudson
(Attorney General's Commission
on Pornography)

APPENDIX "O"

Letter of James J. Clancy dated March 31, 1986, to Mr. James C. McKinney, Chief, Mass Media Bureau, Federal Communications Commission regarding application of Oak for renewal of license.

(Reference: Petition at pages 51 and 54.)

....O-1 thru O-7

JAMES J. CLANCY
ATTORNEY AT LAW
9055 La Tuna Canyon Road
Sun Valley, Calif.

AREA CODE (818)
352-2069

March 31, 1986

Mr. James C. McKinney
Chief, Mass Media Bureau
Federal Communications Commission
1919 M Street, N.W., Room 314
Washington, D.C. 20554

Re: Application of Oak Broadcasting Systems, Inc., KBSC(TV), Corona, California, For Renewal of License. File No. BRCT 030727 KH.

Dear Sir:

On October 30, 1985, I addressed a letter to you on the application of Channel 52 KBSC for renewal of license. A copy of that letter is enclosed as Exhibit 1 to this letter.

In the second and third paragraphs on page 2, I inquired as follows:

> "In a recent phone conversation (October 29, 1985) with one of the attorneys who represents Oak Industries, Inc. and "ON-TV" in a federal lawsuit

> in San Diego, Califonria, I was informed by him that the F.C.C. has renewed the Channel 52 license and that the station has been sold by Oak Industries, Inc. to another party for 33 million dollars, and that the new owner is to begin broadcasting in Spanish on November 1, 1985. He also stated that he believed that there had been a hearing on my petition, and that it had been denied. As I stated above, I have received no communication whatsoever from the F.C.C. regarding my 'Petition to Deny' and have had no notice whatsoever of what action the F.C.C. has taken in relation to T.V. exhibitions which are a clear violation of Federal law.
>
> Would you please advise me by return mail what, if anything, the F.C.C. has done in addressing the claims which were presented in my 'Petition to Deny.' I need this information to determine what other remedies I must pursue in seeking a 'due process' redress of ON-TV's gross violations of Federal law described in my statements referred to above.

Thus far, I have received no reply from you regarding my October 30, 1985, inquiry.

Within the past few weeks, I have succeeded in obtaining a copy of F.C.C. Memorandum Opinion and Order dated January 30, 1985, in File No. BRCT-830727 from a friend in Washington who researched this matter at the F.C.C. This is the first time that I

have seen a copy of that document. In as much as I was the petitioner in the "Petition to Deny" should I not have been sent a copy of the "Memorandum Opinion and Order?" If I should have been sent a copy, would you please advise me as to why I was not? Was it inadvertence?

My researcher in Washington, D.C. has also sent me a copy of the Memorandum Opinion and Order dated August 29, 1985, in MM Docket No. 83-575, File No. BRCT 820802J9 and MM Docket No. 83-576, File No. BPCT-821101KH, involving the license renewal of Station WSNS-TV in Chicago, wherein the FCC Review Board arrived at a different result that that reached by the FCC in the Channel KBSC-TV Channel 52 "Petition to Deny." A copy of that opinion is attached as Exhibit 2 to this letter.

I have also been advised by a news review article that the Memorandum Opinion and

Order dated August 29, 1985, in the Chicago case has recently been annuled by an order of the FCC which directed the Administrative Law Judge to suspend hearings on the question posed by the Board of Review Opinion. The news review article reports as follows:

> "Obscenity question. On its own motion, the FCC has decided to review the propriety of the agency's attempting to determine whether so-called 'adult' movies are obscene. The issue arose in the case pitting group owner Harriscope Broadcasting Corp.'s Video 44, licensee of WSNS(TV) Chicago, against the competing application of Monroe Communications. In that case, the Review Board asked an administrative law judge to address whether WSNS, formerly a subscription TV station, transmitted obscene programing in its STV service, and what effect that should have on its qualifications to be an FCC licensee (Broadcasting, Sept. 16, 1985). In an order last week, however, the FCC directed the ALJ to suspend hearings on that question, which the commission said raised 'an extremely sensitive' First Amendment question. 'We have serious reservations about any suggestion that this agency should examine allegations of obscenity in the first instance,' the FCC said. 'We believe that the public interest would be best served by postponing further evidentiary proceedings pending commission action on the questions raised concerning the board's addition of this issue."

Paragraph 6 of the Memorandum Opinion and Order in In Re Applications of Harriscope of Chicago, Inc., et al., a Joint Venture, dba Video 44, MM Docket No. 83-575, File No. BRCT-820802J9 reads as follows:

> "6. Unlike Oak Broadcasting Systems, Inc., supra, where the Mass Media Bureau did not order a renewal hearing on an obscenity issue against a California station that has some common ownership with the instant station, because the obscenity issue was concurrently before the appropriate U.S. District Court, the allegations before us have not been presented to any local forum in Illinois. In remanding this case for further proceedings on an obscenity issue, we note that Monroe acknowledged at oral argument that it never raised that issue as such at the hearing. The ALJ may therefore utilize the prehearing, discovery, and summary judgment procedures to refine the factual issues to be tried. And if a trial-type hearing must ultimately be held the ALJ should first ascertain what procedures must be utilized to insure that the record contains the type of evidence which provides the 'functional equivalent of a jury determination of a clear community consensus [as to whether] the material is lewd and offensive.' Illinois Citizens, supra, 515 F2d at 407 (Supp. Opinion)." (Our emphasis)

This letter is to advise you that the above statement "because the obscenity issue was concurrently before the appropriate U.S.

District Court" is not correct. As the attorney for the defendant and counter-claimant, CDL, I attempted to do so in a counter-claim but was not successful. In an appeal presently pending in the United States Court of Appeals for the Ninth Circuit, entitled "Citizens for Decency Through Law, Inc. v. Oak Industries, Inc. and Oak Media Development Corporation No. 84-6541, I am attempting to reverse that result.

Because the FCC has taken no action against the "ON-TV Adults Only Program" that TV "packaging" has been transferred from Oak to Select TV which is now broadcasting the same obscene films (hard-core pornography) over Channel 22. I have maintained the continuous surveillances which I initiated in 1981 under my original subscription to "ON-TV Adults Only" and find that the obscene films, which are presently being broadcast on Select TV pursuant to the same ON-TV subscription, as assigned to Select TV, are

the same titled which have been broadcast by Oak in the past on its ON-TV Adults Only Program. At this time, I wish to renew my original protest to the FCC regarding these obscene transmissions which have passed by contract from Oak to Select TV.

Please believe me when I say that, notwithstanding the remark in my October 30, 1985, letter about the Bivens case being applicable, I am not obscessed with "fault finding." On the contrary, my dedication is directed toward placing a focus on the problem and making certain that that problem is resolved in the future. May I hear from your office in this regard.

Sincerely,

James J. Clancy

JJC:rb

Enclosures

P.S. A copy of the FCC Memorandum Opinion and Order dated January 30, 1985, in File No. BRCT-830727, KBSC-TV Channel 52 is enclosed as Exhibit 3.

APPENDIX "P"

Reply of letter of Mr. James C. McKinney, Chief, Mass Media Bureau, Federal Communications Commission, dated May 27, 1986, to James J. Clancy.

(Reference: Petition at pages 16, 51, and 54.)

....P-1 thru P-7

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

May 27, 1986 IN REPLY REFER TO:

8940-AEA

James J. Clancy, Esquire
9055 La Tuna Canyon Road
Sun Valley, California 91352

In re: Station KBSC(TV)
Corona, California
File No. BRCT-830727KH

Dear Mr. Clancy:

This is in reply to your letter to James C. McKinney, Chief, Mass Media Bureau, regarding the above-captioned application of Oak Broadcasting Systems, Inc. (Oak) for renewal of license of Station KBSC(TV), Corona, California. As you are aware, that application was granted by the Chief, Mass Media Bureau, acting pursuant to delegated authority, on January 30, 1985. In so doing, consideration was given to allegations, raised by you in a petition to deny, that the licensee's subscription television (STV) programming includes sexually

oriented films which are obscene or indecent as a matter of law and require a finding that grant of the KBSC (TV) renewal application would be inconsistent with the public interest. By Memorandum Opinion and Order, released February 5, 1985, it was recognized that some STV programming may be offensive or objectionable to some subscribers. However, in the absence of a showing that such programming is obscene or indecent under standards articulated by the United States Supreme Court, that material is subject to the same protection as other forms of expression under the First Amendment and, on the basis of the materials then before us, offered no basis for further commission action at the time.

In your recent correspondence, you state that although now in possession of that decision, you were not personally served

with a copy of that opinion. Moreover, you note that in a subsequent matter involving the license renewal application of WSNS-TV, Chicago, Illinois, the Review Board ordered a hearing to be conducted into that licensee's STV offerings of similar adult-oriented programming. Among the reasons given for that decision, the Review Board observed:

> "Unlike Oak Broadcasting Systems, Inc., ...where the Mass Media Bureau did not order a renewal hearing on an obscenity issue against a California station ..., because the obscenity issue was concurrently before the appropriate U.S. District Court, the allegations before us (regarding WSNS-TV) have not been presented to any local forum in Illinois."

Video 44, 102 FCC2d 408, 411 (1985). Although the decision to conduct a hearing on the obscenity issue was subsequently reversed by the Commission, [1/] you wish to

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1/ Video 44, FCC 86-167, released April 16, 1986.

point out that you were unsuccessful in pursuing the claims against Oak in the U.S. District Court and now have an appeal pending before the U.S. Court of Appeals for the Ninth Circuit attempting to reverse that result. Because the FCC has taken no action with respect to these STV programs, you seek to renew your original protest.

Initially, we wish to note that your original petition to deny the KBSC(TV) renewal, as well as your petition to deny the renewal of Station KNXV-TV, Phoenix, Arizona, filed about the same time, did not contain an address to which copies of Commission actions could be directly forwarded to you. Accordingly, such correspondence was sent to Carol A. Clancy, Esquire, your attorney of record in the KNXV-TV proceeding and the sole affiant of personal knowledge to the allegations

contained in the KBSC(TV) pleading.

Moreover, as to the renewal of your protest regarding KBSC(TV), your pleading is tantamount to a petition for reconsideration of the Bureau's January 30, 1985, action granting the license renewal application. Treated as such, it fails to comply with Section 1.106 which requires such pleadings to be filed, and copies served upon the parties to the proceeding, within 30 days from the date of the public notice of the action. In addition to being untimely,[2/] there is no indication that copies of your pleading were served upon the parties.

2/ As explained above, the delay in your receiving notification was not the result of a procedural violation on the part of the Commission, but rather your failure to provide an address to which service could be made upon you directly. See American Broadcast Companies, Inc., 86 FCC2d 1 (1981). Under these circumstances, and given the fact that you did receive a copy of that decision, we are unable to discern that any rights may have been prejudiced by failure to receive personal service of the staff's January 30, 1985, decision.

In any event, and despite the procedural infirmity of your pleading, analysis of the merits of your claims reveals that you have neither shown a material error or omission in the original decision nor raised additional facts not previously considered in our prior decision that would cause us to depart from our earlier conclusions. See Section 1.106 of the Commission's Rules. As stated previously in our January 30, 1985, decision, the Commission will not become the national arbiter of program tastes or the national censor of programs contrary to Section 326 of the Communications Act of 1934, as amended. In that regard, and notwithstanding your appeal to the Court of Appeals to reverse the lower court's rejection of your attempt to have such programming declared obscene or indecent under standards enunciated by the Supreme Court, there is simply no basis for further

Commission action at this time.

Accordingly, to the extent that your letter represents a petition for reconsideration of the January 30, 1985, grant of the KBSC(TV) license renewal application, it is dismissed.

Sincerely,

Roy J. Stewart, Chief
Video Services Division
Mass Media Bureau

cc: Christopher C. Smallwood, Esq.

CERTIFICATE OF SERVICE

I, BRUCE A. TAYLOR, hereby certify that on this 8th day of September, 1986, the original and 40 copies of the within Petition for Writ of Certiorari were deposited with the United States Postal Service, with first class postage prepaid, and properly addressed to the Clerk of the United States Supreme Court.

I further certify that three (3) copies were also mailed, postage prepaid, to the below-listed party to the proceedings and that all parties required to be served have been served.

ROBERT G. RUSSELL, JR., ESQ.
THOMAS R. LAUBE, ESQ.
PROCOPIO, CORY, HARGREAVES
AND SAVITCH
530 B Street, Suite 1900
San Diego, California 92101
(619) 238-1900

Bruce A. Taylor
Attoreny for Petitioner